UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	:	DOCKET NO. 4:12CV543
EX REL MICHAEL J. FISHER	:	
	:	
VS.	:	SHERMAN, TEXAS
	:	JUNE 4, 2015
OCWEN LOAN SERVICING, LLC	:	1:30 P.M.

MOTIONS HEARING
BEFORE THE HONORABLE AMOS L. MAZZANT,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
MR. MICHAEL BRETT JOHNSON
FISH & RICHARDSON
1717 MAIN STREET, SUITE 5000
DALLAS, TX 75201

MR. SAMUEL L. BOYD
MS. LAURA GALLARDO
BOYD & ASSOCIATES
6440 N. CENTRAL EXPRESSWAY
SUITE 600
DALLAS, TX 75206

FOR DEFENDANT OCWEN:
MR. GERARD E. WIMBERLY, JR.
MR. GABRIEL A. CROWSON
MCGLINCHEY STAFFORD
601 POYDRAS STREET
12TH FLOOR
NEW ORLEANS, LA 70130

MR. RICHARD DWAYNE DANNER
MCGLINCHEY STAFFORD
2711 N. HASKELL AVE.
SUITE 2750
DALLAS, TX 75204

FOR INTERVENOR NEW YORK DEPARTMENT OF FINANCIAL SERVICES:	MR. PETER C. DEAN NY DEPT. OF FINANCIAL SERVICES ONE STATE STREET NEW YORK, NY 10004
COURT REPORTER:	MS. JAN MASON OFFICIAL REPORTER 101 E. PECAN #110 SHERMAN, TEXAS 75090

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

THE COURT: Please be seated.

Good afternoon. We're here in 4:12CV543, the United States of America, Relators Michael Fisher, et al versus Ocwen Loan Servicing, LLC.

So who will be here for the Relators?

MS. GALLARDO: Laura Gallardo as well as Sam Boyd and Brett Johnson for U.S. ex rel Brian Fisher and Brian Bullock.

THE COURT: Very good. And for Ocwen?

MR. WIMBERLY: Gerard Wimberly, Your Honor, on behalf of Ocwen.

THE COURT: Is your mic on? That's the one general rule in this courtroom, you always have to have your mic on because the acoustics are not the best.

MR. WIMBERLY: Is it on yet?

THE COURT: Yes, it is.

MR. WIMBERLY: Thank you, Your Honor. My partner hit the wrong button.

My partner, Dwayne Danner, is here also for Ocwen and Gabe Crowson rounds out the Ocwen team.

THE COURT: And for Boston, do we have representatives here for both of the --

MR. BURD: Gene Burd for Boston Portfolio Advisors, together with Brian Clark.

MR. SIEBMAN: Your Honor, Clyde Siebman and John Buretta on behalf of StoneTurn Group, LLP.

THE COURT: And then is that it? Do we have representatives from New York?

MR. DEAN: Yes, Your Honor.

THE COURT: Okay.

MR. DEAN: Peter Dean.

THE COURT: Very good.

Well, I spent yesterday reading all these materials and so I'm ready to proceed. I presume there's been no resolution or agreement or I would have been notified, so let's go ahead and proceed.

Here's the way I want to proceed is I would like to start with the third parties or the non-parties, their arguments first, and then we'll progress from there. So I don't know if one -- the arguments are basically the same arguments. I'll give both sides the opportunity to say their piece on that before I see what the Relators want to respond. So who would like to speak first on behalf of the non-parties?

MR. SIEBMAN: Your Honor, Clyde Siebman on behalf of StoneTurn Group, LLP. With me I also have, as I mentioned, John Buretta.

There are two components to our argument. The first argument is one of undue burden and the other has to do with privilege. I'm going to handle the undue burden argument and then Mr. Buretta will handle the issue with respect to

the privilege argument.

THE COURT: Very well.

MR. SIEBMAN: If that's all right with Your Honor.

THE COURT: That's fine.

MR. SIEBMAN: As a preliminary matter, I think it would be important for Your Honor to understand that StoneTurn -- the testing was designed primarily to evaluate compliance with certain paragraphs of a consent order and not primarily with respect to the statutes alleged in the complaint. In addition -- and what I mean is in the Plaintiff's complaint. The statutes that they have alleged in the complaint are not the focus of the monitoring that was being done by Stone Group -- by StoneTurn Group.

It's also important for the Court to understand the way that the documents made the basis of the subpoena were received by StoneTurn. There was an FT site process that was used and there was a focal site, an FTP focal site on the Ocwen side of the wall, if you will. So the FTP site is on the Ocwen side of the wall. All the documents from Ocwen are received there.

From there, there were kind of two branches that went to StoneTurn. The first branch was basically the loan files. The other branch had to do with documents that were not the loan files.

Once the information was on the StoneTurn side of the

FTP, individuals from StoneTurn all over the country could download that information to perform their monitoring work. For example, in this case there were StoneTurn employees from Houston, New York, San Francisco, Boston and Washington, DC, as I understand it, involved in the project. So in all of those offices you had individuals who were accessing this information that was coming through the FTP site. When they would download that information into their office, it could be stored on servers, reviewed and what have you.

In addition to that information that's coming through the FTP site, there was also an e-mail process where e-mails were being received basically from -- to and from various individuals. Primarily what we're talking about I think is from Ocwen. The e-mails would be received and they could be received in all of those offices, and then there were also some hand delivery documents.

Searching for this information -- and the information I believe is like 4.5 million pages of documents throughout StoneTurn -- is a monumental undertaking, as Your Honor can imagine. And it's our position that it's a far simpler way to access that information, to access it from Ocwen, on the the Ocwen side of the FTP site, rather than to access it from StoneTurn on our side of the site after it has been disseminated all over the country and all over these

offices.

If StoneTurn was to have to comply with this subpoena, they would in effect have to search servers and databases in all of those offices that I -- that I discussed.

In addition, the e-mails, as you can imagine, go not only from Ocwen to StoneTurn but there's also e-mails between StoneTurn employees. There's e-mails with the New York regulators and back. There's e-mails back and forth between the Monitor. To get into those e-mails to determine which one of those might pertain to the subpoena would be a process that would be -- that's almost unfathomable, and it would certainly not be something that StoneTurn could feasibly do with its manpower in even 60, 90, 120 days. I mean, this is the kind of thing that will take an enormous amount of time on the part of StoneTurn to gather up all of those documents from all of those offices from all of those people.

In addition to that, Your Honor, the ease with which the Plaintiff can obtain what they need from Ocwen is much simpler, and it's also much more justified in that Ocwen is a party to the case.

We have cited various law to Your Honor in the briefing. If you would like me to go through that, I will, but I know Your Honor has that before you.

But the case authority is clear that the burden on a

third party, when the information is available from a party, that burden typically prohibits or limits the amount of information that can be obtained from that third party. So with respect to -- and we cited some case authority to Your Honor both from Judge Schell and Judge Bush here in the Eastern District as well as some other case authority.

But the proposition I think is well-settled that when you're dealing with non-parties, the kind of burden that the Plaintiff would have imposed on StoneTurn is simply unjustified, particularly given that that information can be obtained from Ocwen.

THE COURT: But you concede that all the documents would be relevant to what they're seeking?

MR. SIEBMAN: Well, not as broad as their subpoena is written. I think the subpoena is written so broadly that it certainly could encompass a lot of documents that are not relevant. It -- they use language like "relate to" and "pertain to" with respect to two individuals. It's any document that relates or pertains to those two individuals. So certainly some of the documents, many of the documents would probably be relevant, but given the scope of the subpoena and the dragnet that they have thrown out, I don't think you could make a determination until you saw the documents whether or not all of the documents were relevant.

THE COURT: And then let me ask, the issue of -- I

know you're only addressing the work product issue, but the documents that would fall under work product, are those documents -- are you saying those are too burdensome or are we talking about to segregate those, to locate those documents, or are you saying that just the documents from Ocwen that was received by your client would be too difficult?

MR. SIEBMAN: In order to comply with the subpoena, you basically have to work through the subpoena and you have to look at the documents to determine which documents comply with each part of that subpoena. And I think you would almost have to go through that process before then you could take the next step of the process of determining among that universe of documents that have been captured by applying the language in the subpoena to the universe of documents, you would then narrow it down from there to the work product documents.

THE COURT: Well, I guess what I'm -- maybe I'm being too broad in terms of all work product issues, but clearly in the briefing the Relators want the internal reports, which I know that your client claims is work product. Those reports, my question is, are those that difficult to find? I mean, is that -- are you claiming an undue burden on being able to locate those specific reports that's spread through the briefing?

MR. SIEBMAN: With respect to a particular report that they identified, if they would identify a specific

report --

THE COURT: I don't think they know exactly. I don't think they've seen those reports. I get the impression that -- of course, we'll let them have the opportunity to speak on that. I'm just trying to separate -- let's say I find it's an undue burden. I don't know what I'm going to do on that yet, but let's say I find that but say work product doesn't apply to these internal reports. The question I'm asking you is can they find the reports they're referencing in the briefing that talk about the various possible violations and whatever by Ocwen? Are those readily attainable in the system or are those -- I'm just trying to say, those specific things they're seeking, are those part of the undue burden as well?

MR. SIEBMAN: Right. The more specifically that they can define a particular report that they're looking for -- I'm not asking them to define it by -- you know, by its -- by the name it's saved in the server under by any stretch of the imagination. But the greater extent they can define a particular report they want by classification, characterization, obviously the easier it is to access that report rather than having to go through 4.5 million pages to see what relates or might pertain to a particular topic.

I think Mr. Buretta would probably be better suited to address that specific issue because he's the one that's dealing directly with those work product documents, and that

would be more --

THE COURT: On that discrete question, can you just answer that? And we'll come back. I want to talk about undue burden first before we go into work product, but the question is can you answer that question, Mr. Buretta?

MR. BURETTA: There were a finite group of formal reports that were drafted and then finalized. I think those are limited in number. And those particular reports, in terms of undue burden, would not be difficult to identify. It's all the work in anticipation of those reports that is interspersed throughout work papers, interspersed throughout electronic and hard copy documents received from Ocwen, processed through work streams at StoneTurn and BPA, analyzed by folks in the work stream, and then at the end of the day after that entire process, it gets whittled down to a finite series of formal reports.

So the reports themselves, not difficult. All the other work product, very difficult to try to separate from the materials that are in StoneTurn, both because they're in different cities on different servers in different people's offices and are intermingled with the underlying documents received from Ocwen.

I hope that answers Your Honor's question.

THE COURT: That does. Mr. Siebman, I threw you off maybe your argument. I don't know if you stated everything you

wanted to state on that issue.

MR. SIEBMAN: Yes, Your Honor, I think that probably covers the undue burden.

I would direct your attention also to the language that's used in the prongs of the subpoena and how broadly the operative language of relate and pertain to is. That certainly requires a lot of subjective evaluation on the part of StoneTurn as it looks through the millions and millions of pages of documents to ascertain whether one would fall within that subpoena or not. And then after that, obviously looking for attorney/client privileged documents and work product documents and that kind of thing.

But without -- I would refer the Court to the papers and our briefing and to the case authority that's contained therein and respectfully suggest to the Court that the subpoena certainly as it's drafted is far too burdensome on a non-party to survive judicial scrutiny and that -- that to the extent that they need those documents, they should go first to Ocwen through whatever process. This Court has plenty of power and authority to demand Ocwen to produce whatever Ocwen has that the Plaintiffs want produced, and I think that would be the appropriate way for this Court to proceed prior to forcing this kind of burden on a non-party.

And other than the privilege argument, which Mr. Buretta will address -- and this is a different

privilege argument than the New York -- than the argument with the New York --

THE COURT: No, I'm aware of that. But, Mr. Siebman, before you give up the podium, just to make sure I understand, the Relators are seeking all the documents that Ocwen provided your client, and you're telling me that just even those documents, that that is too burdensome to figure out based on the way y'all have processed those documents, just to get everything that Ocwen provided?

MR. SIEBMAN: That's correct, because the FTP site is on the Ocwen side of the wall, if you will, and it comes to StoneTurn through two -- two avenues. The first avenue basically is the loan files. The other avenue -- and this is a little bit of an over-simplification, but the other avenue is everything else.

When anything is downloaded by StoneTurn from that, it becomes saved on local servers in those various offices that we discussed. So in order to gather that stuff up, you would have to look in all the offices, potentially on the desktops of everyone that worked in the project to see if any documents were saved on those desktops. And it just becomes much much more complicated than it would if you were simply obtaining those documents on the Ocwen side of the FTP site.

They certainly would know what they sent, and gathering

it up before it gets, you know, strewn by the four winds, if you will, as StoneTurn went about its work doing its monitoring work would certainly be the most efficient way to get those documents collected.

THE COURT: I know, Mr. Siebman, your client is one of the non-parties in this case and, of course, I know you suggest that we should wait to see -- for the discovery to be completed between the Relators and Ocwen, and then if there's a need, to come back. But the question I have for you is I don't know if the Court's schedule -- the way this trial is set up, how is there time for that? And, of course, what the Relator's argument is, and you can respond to this -- I assume he's going to make the same argument, or whoever is going to make the argument on behalf of the Relators, as in the briefing, that essentially they don't trust Ocwen and they want to be able to see everything they produced to the Monitors, is that the same documentation they provided to the Relators. So they want to double check the work essentially.

MR. SIEBMAN: And it would be our position that that's an inappropriate burden to place on a non-party such as StoneTurn, that this Court has all the power necessary to ensure that any party to this case provides discovery that this Court orders be discovered. So to the extent that the information is relevant and necessary, this Court has the power to make the parties to this case exchange it.

And when I -- when I say first, what I really meant was make them do it, because realistically if this Court wants Ocwen to produce those documents, it has the authority and the power justly to do that, and that's where this Court should exercise its power, ordering a party that's before it to incur that type of expense and that type of burden and inconvenience.

As we've stated in our pleadings, StoneTurn is not a massive organization. It's small in comparison to Ocwen, and to force its employees to leave the work that they're working on currently and start working on this process would be very disruptive to their business, very disruptive to their clients that they're working for currently and would be unjustified.

So I don't think it really impacts this Court's docket because this Court has the power to force the parties before it to engage in the discovery that the Court deems appropriate and necessary without allowing this type of burden to be placed on a non-party such as StoneTurn.

THE COURT: Thank you, Mr. Siebman.

Let me ask, does anyone from Boston Portfolio, do you want to add anything to this? We'll segregate the arguments and do this and then go to the issue of work product after we hear from the other side. Of course, I'm not forgetting about Ocwen. I'll let you --

MR. WIMBERLY: Thank you, Your Honor.

MR. BURD: Thank you, Your Honor. This is Gene Burd on behalf of Boston Portfolio Advisors.

The Boston Portfolio Advisors arguments with respect to the undue burden are essentially the same and similar to StoneTurn and they apply to Boston Portfolio.

THE COURT: But you only have 12,000 documents though.

MR. BURD: Well, it's 12,000 documents but we are unable to estimate how many pages. Some of these documents are substantial Excel files, multi page Excel files which contain megabytes, tens of -- hundreds of megabytes of data in one file, so there could be to the order of magnitude of two orders or three orders of magnitude more pages to assemble the number of documents.

But also for clarity, Boston Portfolio Advisors is a small company. It has only 18 employees. They are located in Florida. These 12,000 documents are -- while they are located in one location on the Boston Portfolio Advisors servers, they still need to be separated. They still need to be reviewed and understood whether all of them are responsive or not. And that would impose an undue burden on Boston Portfolio Advisors.

THE COURT: Thank you, Mr. Burd.

MR. BURD: You're welcome.

THE COURT: Very good. On behalf of the Relators, Mr. Johnson, are you doing that?

MR. JOHNSON: Yes, Your Honor. May it please the Court. I have some general remarks about the burdensomeness and then I'll address each of the two third parties specifically.

The first thing I will say, Your Honor, is this is not 1990s discovery. These are not 1990s hard copy documents. We're in 2015 and this Court and the parties before it deal every day with electronic documents, their recovery, their location, their culling through electronic means on a scale far greater than this. And it is neither burdensome nor overly costly to do so.

The third parties would have you believe that these documents came in and were scattered by the winds. That strains the imagination, given that the whole point of these Monitors was to carefully examine the specifics of these documents, track them, write reports on them and provide those reports to a governmental agency.

Clearly all of these documents, though they may have electronic copies in various places, are all very well organized, very locatable, because if the New York Department of Financial Services comes calling, these people will have to produce those lickety-split, organized and exactly the way that they're supposed to have done in

keeping track of things. So this idea that they have been scattered to the winds is just not true.

In fact, if they exist on electronic servers, it is a far simpler task to send an electronic discovery vendor to just grab the Ocwen files off of servers throughout a system than it is to go out and have to collect from each individual person. That doesn't happen today, and that's not the reality of how these documents are kept. These people are in the business of keeping documents organized in an appropriate fashion so that they can be used, they can be relied upon later and that history can be recreated.

So that's the reality, and in fact, the evidence does not match up with what has necessarily been stated here, so that would be my general point.

The electronic documents can be collected easily. The hard copy documents, that's a very small portion of these, I suspect, and those also can be carefully put in boxes, collected and sent to an OCR site. So I think there's an overstatement as to the difficulty of this or that it is somehow this big, disorganized process. It's not.

The second thing I will say is that the volume, at least in terms of StoneTurn, is overstated in the sense of what is really at issue. 4.3 million pages may in fact be true, but 90 percent of that are the loan files that Ocwen provided. And so the actual documents that are StoneTurn

documents are a far smaller group. So we shouldn't let the fact that the loan files, which are voluminous -- a lot of pages have been provided electronically so all we've got to do is go get an electronic copy. Very easy, no privilege review. It's clearly responsive.

So that shouldn't mask the fact -- and I thought the Court's questions were good ones -- that locating the reports, locating correspondence, that's an easy task in these cases. For instance, e-mail is easy because you just search on the Ocwen -- Ocwen.com e-mail addresses.

THE COURT: Let me ask, you're not seeking every single document Ocwen provided? Which a lot of these would be loan files.

MR. JOHNSON: We are. We're seeking all of the documents provided, but I'm saying the vast volume or vast amount of the volume here are the loan files. That was clearly the most voluminous information that was provided. There were e-mail correspondence. There were I'm sure other documents provided. But in terms of when we're looking at the scale of things, the bulk of these documents are the loan files.

We are, as Your Honor -- to answer the question about why from these guys --

THE COURT: Right. Why don't you just get them from Ocwen?

MR. JOHNSON: Right. Well, a couple of reasons, Your

Honor. Number one, this document set specifically ties to acknowledged and admitted violations by Ocwen. So this document set has special significance, and this document set and those acknowledged wrong-doings form the basis of knowledge that will be necessary to proving our case in part.

Now, we have alleged violations of various state laws, various federal laws, but at least as to the New York portion, that would be part and parcel of evidence that they knew by virtue of this document set, they knew that they were committing these wrong-doings.

Here's the other thing. These documents -- this is not just a New York problem. This was a Texas problem, a Massachusetts problem, a problem across Ocwen. This document set gives us a road map to the people, the departments, the committees, the reports and other documents that actually are discoverable in this action that relate to this type of wrong-doing. So because of their nature they give a roadmap.

Another thing you've talked about, and I won't belabor it, the fact that given Ocwen's history, we don't trust them. We think we are entitled to some --

THE COURT: I asked -- I made that statement. That doesn't mean I --

MR. JOHNSON: I don't mean you believe it, Your Honor. No, no, no. I'm saying you were repeating our

argument.

THE COURT: Right.

MR. JOHNSON: I readily acknowledge that. That is part and parcel of this.

Another part of this is we took the CEO's deposition on May 15th. He said -- and I can have the transcript provided. He said that he doesn't believe there were any material violations of law. Well, if he says that, then we are clearly entitled to the documents underlying this consent judgment that he apparently claims was just signed as a convenience and that the $150 million fine that was paid and his resignation were just again a cost of litigation type settlement.

But we're entitled to this set of documents because of their import to undermining any allegation that there were not material violations as to the --

THE COURT: But what documents? I guess make clear -- I think Mr. Siebman makes the argument that the subpoenas are over-broad, the requests. I think you had eight requests there and attached the subpoena. So tell me, what specifically are you seeking from them?

MR. JOHNSON: So, Your Honor, here are the categories on the screen. The first are Ocwen's business records. These are Ocwen's loan files and Ocwen's business documents, policy manuals, compliance manuals, compliance reports that they sent

over to these Monitors. These are Ocwen originated documents. I don't think there's any claim that they're privileged or not relevant.

THE COURT: Right. But why can't you first obtain all those from Ocwen themselves?

MR. JOHNSON: Well, Your Honor, I think we can, but they don't have the same -- for one thing, we're four months after we've sent requests for production and we still have only 700 documents, despite the Monitors having millions. So we can obtain some of these, but that will not give us the set of documents that actually underlies the admitted legal violations that have been acknowledged and agreed to as to New York.

So while we may -- and we are I think allowed to check and see, particularly if they're going to take the position their CEO did that there was no material wrong-doing, what the documents were underlying this consent judgment.

THE COURT: What about if you get the reports, and we're not addressing the issue of work product yet, but assuming you got the reports, wouldn't that solve the problem, without getting every single Ocwen document they received?

MR. JOHNSON: I don't think so, Your Honor, because I don't think that -- A, I'm not sure that the reports are necessarily themselves going to give the detail that we would need as to what the violations were. They're also not going to contain the people, the committees, the departments that would

lead us to actually the discovery of other evidence in addition to the New York evidence that relates to the wrong-doing in the case. So I think just the reports alone won't get us there. And, again, we need to be sure that we got what the New York Department got before we rely on any of these reports.

The other thing -- and that's the reason in part for the communications between Ocwen and the Monitors. It's not just what they gave them, it's what they told them. The only source of that is really the communications, whether they're hard copy or e-mail. And that's a unique set of documents that we really can't get and know that we've got everything, because we may not have everything on the -- Ocwen may not have every communication with the Monitors. The Monitors may not have every communication from Ocwen. We need both sides of that communication.

Then we get to the third category, which are the monitoring reports and their communications about those reports, their communications about Ocwen's positions. That's really the third category.

The final category, Your Honor, and this was talked about, about the individuals, is really do these Monitors have anything related to this litigation. I think that category kind of goes by the way side. I don't think they do. That was a catch-all in case they did have materials related to our specific Relators.

So the main things we are seeking are the business records, the communications and then the reports and internal communications about those reports.

And, again, we believe that because of the significance of New York, because of the admitted violations there, we're entitled to that set of documents that we believe is very easily obtained in terms of doing an electronic search, doing an electronic cull, and at least pulling down what Ocwen sent them.

THE COURT: I guess, Mr. Johnson -- of course, I have declarations from both of the non-parties and they claim it to be an undue burden. I mean, I know the Relator's argument is this is easy, but they're saying it's not, that these are relatively small companies. Granted, I think the one is bigger than the other, but -- so, I mean, even if I find it's relevant, it seems a really hard burden to put on small companies. You're making the argument that it's easy to do. They're saying no, it's not. So how do I decide that?

MR. JOHNSON: I think what's missing, Your Honor, is I think there is a failure of proof. They have given you proof of how somebody would have done it in the 1990s. They would have done a hard copy, page by page review. That's not how litigation is done.

What's missing from the record is their affidavit from their electronic discovery vendor that they contacted and

said this is how -- we know your system, this is how we would do it, this is how many thousands of dollars it would cost or how many hours. They didn't do that because they know if they provide you that kind of proof as opposed to the attorney manual review proof that they provided, that it comes out that in fact it's not that burdensome.

The other point I would make on burdensomeness, Your Honor, and this is -- I am about to speak about evidence that I'm so far not allowed to see. It's been filed I guess in camera. But I would be surprised if in fact under their agreements with Ocwen that they are not entitled to charge back to Ocwen the costs of having to produce information. I haven't seen those engagement letters. Ocwen has taken the position that they're privileged. I think they are Exhibit B to their motion.

THE COURT: Let me stop you. I'm curious. That's an interesting question. Mr. Siebman, what's the answer to that question in terms of is your client able to -- if the Court orders this production to go forward, do you get to charge that back to Ocwen?

MR. SIEBMAN: It would certainly be our position that we would. Whether or not it would be their position that they would pay it is a whole different issue, and, you know, that would be something that we would have to fight about. But that really takes us --

THE COURT: We'll talk to them in a minute.

MR. SIEBMAN: That really takes us to the crux of the argument, and that is it's not just the money either. It's the fact that this small company -- StoneTurn is a small company, when you're talking about this type of undertaking.

And the distraction of causing its employees to have to quit working on what they're working on to start working on this project, to bring -- to search the records on their laptops, on their personal desktops and on the servers to see if there could be some e-mail on there that was exchanged between -- I mean, this document -- the overhead here shows internal communications. I mean, that's an enormous undertaking to look at the various e-mails that might have been exchanged between StoneTurn employees or between the New York regulators and StoneTurn or between Ocwen. I mean, if that's what they're talking about, that's enormous.

You know, I don't know what the cost is per custodian in this case, but generally speaking, I mean, the cost of this can often be in the tens of thousands of dollars per person that you have to look through their stuff.

I mean, not only is it a money issue but it's also a distraction issue. You're taking people away from their work and requiring them to go gather up documents that the Plaintiffs could get from Ocwen.

And the fact that it's been four months and they haven't filed a motion to compel -- I don't think they've filed a motion to compel. I mean that --

THE COURT: I believe they did call the chambers but I may have been busy in trial and I couldn't address it.

MR. SIEBMAN: But these are competent lawyers on the Plaintiff's side. They know how to make parties that are not compliant with their discovery obligations to comply with their discovery obligations.

I'm afraid what's happening here is they have decided to go out and try to find a cheap way to get this done, as they see it, but it puts an enormous burden and it's not cheap. It's an enormous distraction and enormous cost on my client to go through and look for internal communications.

One last point I would make is these bullet points look nice and clean, but when you start looking at the way that they --

THE COURT: Well, I'll give you a chance to reply. I just asked that one question.

MR. SIEBMAN: Okay. Thank you, Your Honor.

THE COURT: Go ahead.

MR. BURD: Thank you, Your Honor.

THE COURT: Just limit it to the question that I asked about the payback in terms of whether you have the ability to bill Ocwen for --

MR. BURD: Well, let me just address this one point -- two points that have been raised by Relators. One is regarding the veracity of the submission by Ocwen. There are other methods in the electronic discovery to figure out whether these are a complete and truthful production or not. You don't need to bring third parties to this action in order to double check what Ocwen produces or doesn't produce. Especially in the age of electronic discovery it's not that complicated to do.

The other argument that BPA did not produce the information, did not produce facts to support its burdensome argument, on April 23rd BPA submitted affidavit to this Court where there is an estimate that it would take 240 to 300 hours to review and determine whether the documents are responsive to the subpoena or not.

THE COURT: Okay. I asked one question and you haven't answered the question. I didn't want to hear anything else other than answer the question. Are you going to answer the question I asked? The charge back.

MR. BURD: Yes, and the answer is there is -- there is indeed a provision in the agreement, relevant in our agreement. But, again, at this point it's unclear whether Ocwen would reimburse this cost or not.

THE COURT: That's fine. I'll give you a chance to respond to everything else later.

MR. BURD: Thank you, Your Honor.

THE COURT: Mr. Johnson, go ahead.

MR. JOHNSON: Thank you, Your Honor.

Turning to -- again, with due respect to counsel, there's a lot of conclusions about how difficult this would be. There's no evidence and no one has tried to -- this isn't Bank of America. We're not going out and searching throughout the world. There's 65 employees, as I understand it, in Mr. Siebman's client. And doing an electronic search of those employees is neither difficult nor expensive, and that's the reason you don't have the evidence on that. It's their burden to show burdensomeness, and not using or taking advantage of technology that is readily available to them.

The other -- turning to the Boston group, Your Honor, it strains the imagination that 12,000 documents, particularly when many of them are Excel spreadsheets which are not going to be reviewed, those are going to be -- they don't contain attorney information. They don't contain privileged information, putting aside the banking privilege. 12,000 documents where most of them or many of them are Excel spreadsheets is not a difficult review.

I understand. I've represented third parties before. Third parties never want to participate in discovery. It's not their fight. But the reality is they are the keepers of certain information that was used in proceedings in New York

where there was an admitted -- admitted violations by Ocwen that relate directly to our case. And we are entitled, particularly as Ocwen's officers or former officers are disputing whether it was a material violation, even though they agreed to it, we're entitled to those documents.

They're readily ascertainable, particularly at Boston where there's 12,000, and using anything other than old technology producing these materials is not difficult.

Now, again, I firmly believe that every bit of the costs can be billed right back under that letter, and I think you've heard that from counsel.

THE COURT: Maybe that's true, but when you're dealing with a small company, you're taking -- even if they get reimbursed for it at some point later, you're taking a number of employees off of their regular duties.

MR. JOHNSON: Your Honor, that has not been my experience. Employees -- because our employees at our client, their employees, that's not their job, to go collect their materials. That's why electronic discovery vendors come in and swoop the e-mail. They search it for Ocwen. They search it for relevant terms and get the group, and then we agree upon typically key terms to then search the larger group. But we're past the days of people segregating their own e-mail.

There may be some hard copy documents and I'm sure those can be taken care of over time, but we're past the

days of employees having to do this themselves. Vendors do this because you can do it electronically now from outside the system.

And I would stress, Your Honor, I think that the relevance here is high. We would be in a different position if Ocwen was standing up saying, oh, yeah, you know what, here are the documents we provided to New York. We might be in a different position. We would still want to check them. We would still want the underlying reports and conclusions and communications. But they're not doing that either. They're trying to forestall discovery too.

So, Your Honor, I think the cost is minimal. The volume is manageable. And using technology, this can be accomplished very quickly and ultimately be at a cost of the party litigant, in my opinion.

THE COURT: And before I go to Ocwen, did either of the non-parties want to respond to anything there?

MR. SIEBMAN: Yes, Your Honor. Clyde Siebman on behalf of StoneTurn.

Your Honor, the oppressive costs and burden of this E-Discovery that Mr. Johnson suggests is so easily done, that it's just part of pushing a button, that -- the burden and cost of that type E-Discovery is so oppressive, even among parties, that it's the subject of much debate in this type complex litigation. It's even the subject of a

proposed Congressional action it's so burdensome.

The cost of this type discovery, even among parties -- I mean, we all know how oppressive it is because we see it in every one of our cases and we hear about it from the halls of Congress and we hear about it from actual parties.

And imposing that type of heavy burden of E-Discovery of this level on a non-party is simply not justified, particularly where virtually everything they talk about they can obtain from a party to the case if they can justify that.

For example, communications between Ocwen and the Monitors, Ocwen has that. If it's a communication between the two, they're clearly going to have it.

The last thing I would say is these bullet points are really nice and crisp, but you compare them to the subpoena and you see something else. Category six in the subpoena says all documents and communications that refer or relate to the instant litigation. That literally requires StoneTurn to comply with this subpoena to go through all of its documents and look and see which documents refer or relate to this litigation.

Now, they could guess that maybe a bunch of them don't, but in order to comply with a Court order, with a subpoena, you have to go through the documents and look. You can't just guess that I bet there's nothing in that box that

relates or refers.

Not only that, but somebody has to make a decision when they find a document on whether or not it relates or refers. You look at nearly all of these and they talk about things that are relating or referring, so basically broad categories. All communications and other documents, whether electronic, print or printed, which evidence or relate to Ocwen's compliance with federal and state laws, including but not limited to the 2014 consent order.

I mean, that requires -- each one of these is going to require a review of virtually all the documents, and an argument could be made of all the documents, but certainly a lot of the documents to determine whether or not these broad categories pertain.

And the last thing I would say is that the type of -- of burdensome, heavy E-Discovery that's even being questioned in the courts now on whether or not it can be justified between parties, that certainly can't be justified when it comes to a non-party such as StoneTurn.

Thank you, Your Honor.

THE COURT: Thank you. Let me ask Boston Portfolio if they want to make any additional comments.

MR. BURD: Gene Burd for BPA.

Your Honor, in closing, I would like to address some of the comments my colleague for Ocwen mentioned. One is that

the requirements to involve employees of the company. To date there are hours and hours of employees' time from my client has been spent to communicate with counsel, to preliminarily review the documents and address -- how to address the subpoena.

This is -- even assuming that there would be a e-discovery vendor retained, you still need to have input from the employees because the documents that BPA has, a lot of them involve complicated accounting and complicated mortgage servicing reports and spreadsheets that need to be understood. It would need to be understood whether they're in fact responsive or not responsive, because in some sense the subpoena is specific but in some sense it's rather broad.

Moreover, the subpoena asks for all of the documents relating to current litigation. That could include the documents, for example, internal e-mails, even after BPA ceased its monitorship engagement in relation to monitoring internal e-mails and e-mails between different parties, even after the monitorship was completed. So from that end there is a very broad scope of the subpoena that we would like you to address.

Thank you.

THE COURT: Thank you. Mr. Wimberly on behalf of Ocwen.

MR. WIMBERLY: Your Honor, it's unbelievable that Relators rely on fundamentally not only a factually incorrect premise for their relevancy argument but it's nothing but rhetoric, and that is that we're looking at admissions. And in order to make this material relevant, they -- they have to get there, that somehow Ocwen admitted wrong-doing in New York, and that's absolutely false. If you look at the consent decrees themselves, Your Honor, there is no admission in there.

Now, we may argue about that on the merits down the line. I appreciate that. But it's not self-evident that there are admissions in there. In fact, what it looks like and what it should look like to the jury ultimately if we get there is that Ocwen settled a dispute with its regulator and paid some money to do so. But consistently the acknowledgments that -- instead of admissions, you have acknowledgments that there were allegations and that there was an investigation of allegations and that my client, which is a regulated entity and intends to continue to do business in the State of New York and elsewhere, ultimately settled the matter with the regulator.

So then driving --

THE COURT: So essentially it was settled prior to any finding so you had allegations of misconduct or --

MR. WIMBERLY: Right, Your Honor.

THE COURT: Okay.

MR. WIMBERLY: And to drive that into this -- and we've heard this and you've read this in the briefs. You would have seen it yesterday, Your Honor, this notion of we're the serial discovery abuser, quote, end quote. While --

THE COURT: You don't have to go there. I mean, I don't --

MR. WIMBERLY: I appreciate that, Your Honor, but it gets to their -- they're continuing to allege that we have bad motives in connection with discovery, and it isn't the case. The reason we're sensitive to that is that we are struggling with a mountain of discovery requests.

And it is -- the second point I want to make, Your Honor, in connection with the burden is it's absolutely naive in 2015 -- I was around in the 1990s. I understand what counsel is saying. It's absolutely naive to think you can just lickety-split, quote end quote, produce electronic records when you have a company and a project like this with four million images, we understand. But when you have a company whose business it is to create electronic data with respect to millions of consumer transactions regulated here, there and everywhere, subject to all kinds of -- we keep a lot of records.

Then on top of this, Relators in our case have refused to limit the number of custodians. As Your Honor would know, the more custodians you get, the more mountains you

get in the mountain range of burden on electronic discovery. And you're talking about, in particular, e-mail files.

Now, I would think as they do, if you don't know anything about what's actually going on, well, why not just download it, download it and search it.

We have one of the biggest ESI vendors working on our side in this case, that's Epic. It's taking them an extraordinary amount of time to go through the process of pulling the e-mails out of the system, putting it in a form that's searchable and then employing the searches that would pull out the relevant information.

In the cases, as other counsel -- as BPA and StoneTurn counsel have explained, there's an intermingling of stuff. So they are entitled to and will have to go through that material and sift out what's not pertinent, and depending on Your Honor's decision on the privilege, what's privileged and so forth.

Let me move to something just so the Court understands our position. I think it's been obfuscated a bit in the briefing by Relators. We have never said that we won't produce business records. In fact, Your Honor, we've started the process of collecting the business records that were provided to the Monitor through the portal that counsel alluded to earlier. Our side of it -- very true, on our side the stuff goes out. Therefore, it ought to be the same

stuff that gets on the other side. Take their burden argument and say that's burdensome on their side. On our side we are looking at our part of the portal. If it is a business record, if it is a communication that would have existed, notwithstanding the examination, we are not asserting that that's blocked from discovery. We are pulling that information and we are processing it for production. That's going on right now, Your Honor.

So there is validity to the point -- and let me say, if the Court ends up to accommodate burden, let's put it on Ocwen, we don't need a court order, Your Honor. We're doing it, by the way.

Ocwen should be able to produce the materials that were provided to the Monitor that are at the core of their demand that are not subject to the privilege and so forth and we'll move on.

They are not entitled to the analytical work product. They continue to want to scavenge that kind of stuff to prove their case. As Justice Scalia said, it's smuggling. And I understand that's rhetoric, Your Honor.

But the point I'm making is they'll get what they need. They should get what they need from us. We are in the process of packaging it for production. We can talk about timing and that should alleviate these guys, because ultimately we're talking about utter duplication of effort

and that should be prevented by the Court.

THE COURT: So when are you going to be producing all these business records?

MR. WIMBERLY: I can't give -- Your Honor, I apologize to the Court. I can't give you a date certain. I can tell you right now we have located and we have started to pull stuff out of the Share Point file, which was the repository and the transfer point. And we should have an answer to that question very shortly and be happy to report to the Court.

And, Your Honor, just so it is clear, it's my understanding this stuff has been tracked, so it may be that it is pretty quick and efficient to actually produce it. Unlike the records in other parts of the discovery in this case, which have never been screened and so forth, presumably these records have been screened, they're Bates numbered. I mean, I can't speak to actually what's in there, but for the most part, it should be a pretty quick and efficient process, but I apologize to the Court, I don't have a date certain.

THE COURT: Thank you. Mr. Johnson, do you want to add anything?

MR. JOHNSON: Just a brief response, Your Honor.

THE COURT: Is your mic on?

MR. JOHNSON: I think I do. Am I?

THE COURT: Yes, it is. Go ahead.

MR. JOHNSON: The one thing I would say in response to Ocwen -- first of all, I think the Court should read the consent order because the language is we stipulate and agree, not just acknowledge, but that's sort of beside the point.

The question about the electronic records is -- it comes down to this. If New York's Department of Financial Services walked into StoneTurn today and said show us what they gave you, there is no way that they would say, well, you know what, we need about four months. That's not their job. Their job was to keep all this together, monitor it, analyze it, and it's their liability if they don't do it.

These materials are a collected set of documents. They're sitting there. They're relevant. They don't need to review for relevance because they deal with the loan servicing process that is at issue in this case.

So they don't need -- this is a complete red herring that they don't know where they are, they're hard to collect and that they somehow are incredibly burdensome, particularly where -- I mean, in one case, I think it's Boston's server. There are only two servers or two databases, one in Florida, one in Dallas. And particularly as to the Ocwen provided documents on Share Point, I believe that was preserved on the Share Point site.

So really, I don't know -- our whole problem comes down

to what Mr. Wimberly just said, which is they're going to get them to us but we don't know when.

And the third party documents we think we're entitled to because those documents have special significance because they are linked to admitted bad behavior.

Thank you, Your Honor.

THE COURT: Okay.

MR. WIMBERLY: Your Honor, I won't bother to address his suggestive that we're in this supreme breezy kind of we'll get to it when we can. We're working really hard, Your Honor. It's costing my client a lot of money and I appreciate that we -- we have obligations. We have a nationally known ESI vendor who's working on this very problem. We have my team at McGlinchey Stafford working on it. We are not disregarding the urgency of getting through this litigation, Your Honor.

THE COURT: Very good.

MR. WIMBERLY: And just one other thing. Counsel says we stipulated and agreed. We stipulated and agreed that it was an investigation and there were serious allegations. We didn't stipulate and agree to wrong-doing.

THE COURT: I understand. So on the work product issue, are we ready to go onto that? Mr. Siebman, did you have something else you wanted to throw in?

MR. SIEBMAN: Just one last thing, Your Honor. We obviously have a dispute about the burden. We have submitted

our affidavits, our evidence to the Court, the declarations showing how heavy the burden is on StoneTurn, and we would ask the Court to look at that evidence as opposed to just rhetoric.

THE COURT: Mr. Siebman, you got back to the podium, so let me ask a question. I may not have asked this question, but since you came back up again. Why is this any different than, in a more simpler context, of like medical records, other records that in litigation one side provides the other but yet they want to still go get the original records to make sure nothing's missing? That happens all the time in other litigation that I have. It's a much simpler scale. We're not dealing with millions of documents. But why is it any different than that in terms of the need to go to non-parties in seeking documents?

MR. SIEBMAN: Well, I think it gets down to the breadth of the subpoena and it gets down to the burden imposed when you have this many documents.

What they are looking to require us to do would take an enormous amount of time. For example, Your Honor, as you heard from Ocwen and as you heard from the Plaintiff, they have been wrangling about how to go about doing this for months. And if Your Honor ordered us to do this, we would start much earlier in the process. You've got to start figuring out what terms you're going to use to do searches on search terms. You've got to figure out how many

custodians and which custodians. I mean, the process that would be required if Your Honor ordered us to comply with that subpoena would put us far back on the racetrack than where Ocwen is right now. You can't just order -- I mean, you can, but it's not appropriate, it's not justified, and there would be no way for StoneTurn to comply. I mean, if you ordered them to produce those documents today, there would be no way. It would just be impossible.

THE COURT: Well, how long would it take?

MR. SIEBMAN: You know, they've told me that they can't do it any sooner than -- they don't think they can do it in 60 days. They're not sure they can do it in 90 days. And that I think itself reflects to Your Honor the enormity of the task.

And you've heard from Ocwen what they're going through to do this and that's the same thing that StoneTurn would have to do except with a much smaller organization. And while they're doing that with their small organization, they're totally distracted from the work that they're supposed to be doing for their existing clients under their existing contracts.

So in the context of this case, based on the evidence that's before Your Honor, the burden that you would be placing on a non-party is just astronomical in terms of requiring them to do that.

So we would ask Your Honor to consider the evidence. It seems to me that these two parties are the ones that should be fighting about what should be produced, and then the parties should produce that which Your Honor agrees or they agree to be produced in the case.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Siebman. Okay. Work product.

MR. BURETTA: Thank you, Your Honor. John Buretta on behalf of StoneTurn.

I'll focus my brief remarks on the LTV decision by the learned Judge Higginbotham. Judge Higginbotham, well before his time, before many Monitors had been imposed anywhere around the country, recognized back in the early 1980s the following situation: If you had a regulated financial institution or any kind of company that retained a consultant to assist the company with respect to reviewing whether something went wrong or didn't go wrong and what happened and the company did that, that consultant's work would be protected by the work product protection and would be in anticipation of litigation.

What Judge Higginbotham realized in the LTV decision is that when you have a little bit different situation where you have a regulated company which has a regulator staring it down, looking at it, and where you have a consent order

entered into that creates additional requirements for that regulated company, and both the company and the regulator agree that there should be a third party who will be creating dramatic efficiencies for both sides but also protecting and enabling efficient flow and open flow of information between the regulator and the regulated entity, that is protected by work product as well.

As we point out in particular in StoneTurn's reply brief, LTV is really on all fours with the situation here. There you have a consent order. Here you have a consent order. There you had someone who was called a special officer appointed that both the FCC and the regulated party had some input into. The person was appointed and the person had duties both to the regulator and to the regulated entity. In that circumstance Judge Higginbotham said work product applies. And as we pointed out in our briefs, it applies here as well.

Perhaps one of the most important points to really boil this down is the argument that Relators are making to Your Honor is that they should not just have to look through the underlying broad data. They shouldn't have to analyze it themselves. They shouldn't make their case themselves. They shouldn't look at those materials and determine what as to their specific allegations -- and here we're on the fourth amended complaint. There's been a maturation or a

change in what the allegations are that would even specifically pertain to the work that was done by StoneTurn and BPA. But in any case --

THE COURT: I think we're only on the third. I don't think I've granted leave for the fourth. But go ahead.

MR. BURETTA: I think I heard about a fourth possibly coming. I apologize.

THE COURT: There's a motion pending but I haven't granted it.

MR. BURETTA: Okay. Fair enough, Your Honor. Third Amended Complaint. In LTV, Judge Higginbotham there again addresses this precise point and says it is not -- it is not a basis to bother a Special Officer or a Monitor with respect to their own particular analysis of the issues that they were looking at, to be taking that analysis from that because it is protected by work product, and there's no injustice in that because the party to the case that's making the allegations is going, as they will here and are, they will get the loan files. They will be able to assess how those loan files relate to the allegations they're making. And it's the same situation here.

The last point I would make, Your Honor, is that on this relevance point that's been floating around, just to echo but amplify for a moment as well what my colleague Mr. Siebman provided to Your Honor, it is actually not clear what of the material that StoneTurn and BPA has is relevant

to the allegations that are being made here.

Loan files actually have a lot of different dimensions to them. There's the loan itself. There's the terms of the mortgage. There are the terms of foreclosure with respect to a loan that's in default. There are provisions that could be in these files as well about refinance of the mortgage, about providing to the customer who holds the mortgage some better or additional terms.

So the consent order in New York looked at some very narrow categories of issues, and at least when I read the amended complaint -- I apologize, the third amended complaint, it's not clear to me that these line up together.

What StoneTurn looked at and BPA was limited to New York state loan files. I don't understand the allegations here to be limited to that. I think Relator's counsel has said it relates to a variety of different states.

And I'm not seeing congruity necessarily, at least based on the allegations we're reading. We're not a party so we're not having -- you know, we're not at depositions where people might be spelling out in any more detail what exactly is at issue here. But it's not clear, I would say to Your Honor, what our client did lines up.

And it really feeds back to the point made in LTV that a party to the case shouldn't have -- shouldn't impose on a third party the burden of turning over analytical work. And

I would say to Your Honor here all the more so when it's not clear what's relevant.

And lastly, the subpoenas are incredibly broad, as Mr. Siebman so ably pointed out to Your Honor, and they're not at all doing the work for us to try and suggest what finite area really, you know, is at issue here.

But in any case, as to our work product, our own internal correspondence, our correspondence with DFS, with BPA, with Ocwen, we think LTV is on all fours.

And I thank Your Honor for your time.

THE COURT: Well, let me ask the question that -- where can I see the issue of the monitoring in this case, the primary motivating purpose of that, that was the primary motivating purpose, versus -- I mean, was it for future litigation or what was the purpose for monitoring?

It doesn't seem to me to be exactly the same for preparing for litigation. And I don't have the LTV case in front of me, but when I looked at it yesterday I don't know if those facts and these facts are exactly alike. At least I didn't bring any notations out from that.

So are you telling me those factors are exactly identical, that there was no issue regarding the monitoring in that case involving some litigation? Or am I confusing it with another case? It seems like it was a dual purpose. Maybe I'm wrong. Maybe that's not the LTV case, but correct

me or educate me on that.

MR. BURETTA: Sure, Judge. So at 89 FRD 614 in LTV, the Court talks about how the Special Officer was retained by LTV to implement a consent decree with the SEC. So it's the same situation as here. Here StoneTurn and BPA are put in place as a result of a consent order. It's just with a different regulator. So it's not the SEC. It's the New York Department of Financial Services, which is also obviously a regulator of financial entities. So the factual difference is simply SEC versus New York DFS.

Same thing in terms of a consent decree being implemented and the purpose of the person appointed, in that case called a Special Officer, here called a Monitor, the same as well.

There are numerous cases we list, Your Honor. At page five, for example, of our reply brief we cite numerous cases indicating that an investigation by an agency, a regulator, the SEC, others, is in anticipation of litigation. It doesn't have to be about the prospect technically that a civil lawsuit will be given a docket number in a federal or state court. An agency's investigation of a regulated entity is -- where the object of what the person is doing is in relation to that, that is anticipation of litigation. And we cite several cases, including a Fifth Circuit case going back to 1982, about this issue as well there in the

context of the SEC.

THE COURT: Would you agree that the -- is the correct analysis for the Court to look at is, was the primary motivation purpose behind the creation of the document was, A, for possible future litigation?

MR. BURETTA: It was, Judge. So obviously the context and the facts here matter. Here you have a consent order put in place. It has specific requirements that are imposed on Ocwen. The Monitor is there to assess and ensure the compliance with respect to that consent order.

There is obviously the prospect -- and I think New York DFS points this out in its brief as well. There is the clear prospect that there could be violations found with respect to the first consent order, and indeed, what in fact happened here was that a second consent order was imposed on Ocwen with respect to further issues that were identified as to its handling of loan servicing.

So the short answer is yes, this was absolutely the primary purpose.

THE COURT: Thank you.

MR. BURETTA: Thank you.

MR. BURD: I would completely -- Gene Burd for BPA.

I completely agree with my colleague for StoneTurn, but I would also like to add that there are other cases that have been cited by BPA in its brief, and in particular this

is 636 F.2d --

THE COURT: Say that again.

MR. BURD: U.S. V Davis, 636 F.2d 1028, page 1040. And it directly addresses the issue that once the investigation, the government investigation has begun, there is a sufficient basis for work product privilege to attach.

And there are other cases, and I found a case which was not cited in the brief, but that's the Julich case, Julich versus State Street Bank and Trust Company in the 214th -- 2014 Westlaw 394 2934, and it's a District of Massachusetts case of 2013. It specifically states once the government investigation has begun, litigation is sufficiently likely to satisfy the anticipation requirement. And, of course, as my colleague noted, once the investigation has been conducted by New York Department of Financial Services and that of the context in which my client BPA has been retained.

Thank you, Your Honor.

THE COURT: Thank you. Mr. Johnson, are you doing this argument as well?

MR. JOHNSON: Yes, Your Honor.

Your Honor, briefly, I think Your Honor is correct about LTV. I don't believe those facts are on all fours with this case. I believe in that case there had been an actual threat of litigation and I believe the evidence in

that case was different in terms of the threat of litigation that we have here.

The evidence we have here is that they knew there was a possibility of litigation but they didn't -- there's no evidence that the primary motivating factor or primary purpose in creation of these documents was in fact threat of litigation.

And I would direct the Court to the I believe Fifth Circuit case that finds similarly, the Guzzino case in the Western District of Louisiana, which noted that the investigation that is ongoing by even a federal agency doesn't give rise to an anticipation of litigation. In fact, I think as Your Honor is recalling, if you look at LTV, it is different in terms of what the evidence was and the circumstances were.

It is not the case that just because there is a monitoring -- there are not cases out there that say, well, if there's a monitoring that's ongoing or there's a consent decree that's ongoing and, therefore, everything that's done is work product. It is still, as I understand it, a document by document circumstance by circumstance analysis, and the evidence in this case does not match up to that. There's just not an anticipation of litigation that was the primary purpose behind what these people were doing or behind the creation of these reports about their compliance

with the consent decree.

So, Your Honor, I believe that work product will not apply generally and does not apply specifically in this case, given the evidence and record before the Court.

THE COURT: Thank you. And does Ocwen want to comment on the issue of work product?

MR. WIMBERLY: Yes, Your Honor.

MR. JOHNSON: Oh, could I say one other --

THE COURT: Yes, go ahead.

MR. JOHNSON: Sorry. The other thing I would say, Your Honor, is work product would protect a very limited amount of material in this case. Work product would not protect anything that moved between Ocwen and the Monitors or Ocwen and the State of New York. So it's very limited in what it would even apply to. We don't think it applies, but the only thing it could apply to is something that stayed within the four walls of the agency, because otherwise it's waived.

THE COURT: Mr. Wimberly.

MR. WIMBERLY: Your Honor, just briefly. It's obviously the Monitor's work product we're talking about, but since Ocwen is the regulator and was involved in the discussions, we do have a position on that, that this entire exercise of the monitoring was driven by anticipation of litigation, which we think is obvious and is evident clearly in the 2014 -- the terms of the 2014 consent decree, Your Honor,

just to add that to the Court's analysis.

If you look at the "whereas" section, again, there is no acknowledgment of wrong-doing, but the parties acknowledge that there are issues and that the regulator was looking into violations of law. Then it concludes, Your Honor, that the Department and the Compliance Monitor identified numerous significant additional violations of the 2011 agreement and this is now therefore to resolve this matter, the parties agree to the following.

I think it's evident that the parties were in anticipation of litigation throughout the monitoring process, especially if you think about how it is mapped out. It starts with an agreement on servicing in 2011 or 2012, I believe. It was a targeted examination that got hot and that began to raise some serious issues. So the parties then entered into two consent decrees. This is the second. The other one set the Monitor up, which followed from the earlier agreement that the regulator felt had not been complied with. But it sets up this monitoring process and the very formal, very focused, there could be -- there could be litigation context. And, Your Honor, if that isn't objectively anticipation of litigation, I -- I don't know what it is, and I think certainly that's consistent with the primary purpose test, which is the Fifth Circuit's standard.

Then subjectively, the -- I believe it's in one of the

affidavits that maybe StoneTurn -- pardon me if I can't remember -- but it's stated there that at least the Monitor thought it was in anticipation of litigation.

THE COURT: Thank you.

MR. WIMBERLY: Thank you, Your Honor.

THE COURT: Let me just ask if the other non-parties have anything else you want to add? No? That's fine.

Mr. Johnson, did you have something else you wanted to add to this?

MR. JOHNSON: Your Honor, the only thing I would say is as you look at the evidence, the Monitor actually does not say they anticipated litigation. They say that they knew it was a possibility. The language they use is not as strong as what the Fifth Circuit requires.

And I think the other thing I would point out is if you look at the LTV case, I think the part that is being relied upon by counsel really has to do with the Special Officer privilege and not necessarily the analysis of work product. I leave that to the Court.

MR. WIMBERLY: Your Honor, if I may, just one thing.

THE COURT: Is your mic on?

MR. WIMBERLY: It is.

THE COURT: It is?

MR. WIMBERLY: It is, Your Honor.

Anticipation of litigation, the phrase in the Davis

decision is to aid in possible future litigation in quotes. I think counsel is wrong to draw it out so much that I know I'm going to get in litigation kind of context. It really is more anticipatory. It's more vague than that. To aid in possible future litigation is enough for the primary motivating purpose.

MR. JOHNSON: That was not, Your Honor, where I was focused.

THE COURT: Hold on a second. Mr. Wimberly, so let me ask you a question. Is -- is it your position that every time there's a monitoring situation, that an agency, some government agency could end up ordering monitoring on a private entity, that that's work product, and there's a consent decree? That every situation -- I didn't think it was a bright line rule that says, okay, if you have that situation, it's work product, period.

MR. WIMBERLY: Your Honor, fair point. No, that's not my position. My reading of the case is it is case by case. We've got our factors. That's why I wanted to point out to the Court the actual language of the consent decrees, and if you look at them in their context, this is a -- this is its own set of facts. I would say -- I'm sorry, Your Honor.

THE COURT: Go ahead.

MR. WIMBERLY: I would say that one hand -- it's a continuum. On one side you've got a regulatory enforcement

investigation that could lead to the Justice Department says there's a trip wire versus on the other side there is the routine monitoring behavior in a jurisdiction by a regulator, and so you have to look case by case. And I think in our case we do have anticipation of litigation.

THE COURT: But do you believe that having a consent decree coming out, which -- in that situation you're not saying when there's a consent decree and there's monitoring because of that consent decree that there's some bright line rule? That's not what you're saying to the Court? I just want to make sure.

MR. WIMBERLY: No, that's not what I'm saying. What we would say about the consent decree is it clearly marks a settlement opportunity. That's another argument, but --

THE COURT: Isn't that going to be the situation? I mean, every consent decree by its very nature is some agreement that has come up because -- either preceding any kind of litigation, but it's in settlement. I mean, it's an agreement to do something on both sides or one side to do something. So how -- under what you're asserting, why wouldn't everything be work product?

MR. WIMBERLY: I think they -- I think the consent decree is different from the language. With due respect to Pete, Mr. Dean, New York tends to be a little more aggressive than lots of other jurisdictions, Your Honor.

I think when you're in that kind of environment,

especially in light of the problems that were surfacing with respect to the economy in general at this time period, people concerned about banks and mortgage lenders and so forth, I think you have a super-charged atmosphere.

And I think all you have to do is find that as to this particular case it was in anticipation of litigation.

THE COURT: Thank you. Go ahead, Mr. Smith, or Mr. Johnson, you wanted to make some comment.

MR. JOHNSON: Yes, Your Honor. The part I was focusing on is not the end of Davis but the beginning, which is that the primary motivating purpose behind the creation of the document must be the possibility of litigation.

And here, to use an analogy, Your Honor, the consent decree is no different than any other contract. That contract may get breached. You may have litigation about it because the party under the contract doesn't perform as they're supposed to.

So that's why there's no bright line rule in these consent cases, because until you have something more than just a contract or just a consent order, you're not giving rise to that possibility of litigation that exists. It doesn't exist any more here than it does in most other contexts, and that's why the test is what it is and there's no bright line rule.

Thank you.

THE COURT: Thank you.

MR. BURETTA: Can I just add one thought, Your Honor?

THE COURT: Go ahead.

MR. BURETTA: The question you asked, I think the answer really is in LTV Judge Higginbotham there says there are criteria. So if the consultant that's retained by the company would have been acting in anticipation of litigation, that's one important factor and you need to check yes to that.

If the company appearing directly before the regulator would have also been subject to a state law protection there -- in this case there would have been -- Your Honor, in our view, doesn't need to decide that. But it's important because in LTV Judge Higginbotham says, look, if we have a company sitting in the room with the regulator, there would be a privilege that applied to that discussion as well.

What LTV addresses is the in between the Special Officer and the Monitor who's collecting and analyzing information in the context of the consent decree where it clearly is in anticipation of litigation. So that is a subset of all Monitors that exists in the country.

There are many monitorships. I dealt when I was in government with many monitorships and selecting Monitors. Many monitorships involve companies that don't have that regulated aspect to them where they're not going to be in

front of a bank regulator routinely. They don't really have a regulator, frankly, if they're in the electronics industry, for example, where there are foreign court practices and violations of that and Monitors were imposed there.

It is possible that Your Honor doesn't need to decide it, and I'm not saying I'm landing on it either, but -- for my future clients, but it would not necessarily meet the LTV criteria. And so the bottom line is it's not actually all Monitors that LTV would cover.

THE COURT: Thank you.

MR. BURETTA: Thank you, Judge.

THE COURT: Okay. So let's move to -- I think we should maybe start with the issue of the New York banking privilege. Now, I know, Ocwen, you filed a motion to quash and you raised other alternative arguments on different and various privileges or rules of evidence. The question is who wants to go first on that issue? Does -- we have a representative, I guess, from New York somewhere?

MR. DEAN: Yes.

THE COURT: Or does Ocwen want to lead off on just the issue of Section 36 Subsection 3?

MR. WIMBERLY: Your Honor, we would defer to Mr. Dean for the regulator.

THE COURT: Okay. Mr. Dean, I'll let you, and then

we'll come back to the other issues to the extent that we want to discuss the other issues. I think they're adequately briefed, but this is the one that piqued my interest in terms of addressing, if I have to get there.

MR. DEAN: Thank you, Your Honor.

THE COURT: And I wish I could say -- I typically like to make decisions here so I don't have to write an opinion about it, because I'm extremely busy. I had thoughts coming into the hearing and I'm not so sure where I'm coming down on it. So in terms of the issues we've already discussed, I will be candid, I mean, coming into it, I was inclined to deny the motions to quash, which I'm sure -- but I'm not sure of the answer there now. So for me I'm going to have to write an opinion to figure out how I want to come down on that.

So that's the reason why I want to go to that next, just in case. That was my inclination going in. Maybe it will be finally when I'm done, but we'll come back. I'll deal with that later. So to give you just kind of my thoughts off the top of my head.

MR. DEAN: Thank you, Your Honor. Peter Dean on behalf of the Department of Financial Services, and I say that I hope you don't have to reach the privilege issue here either.

I just want to be clear about what we are arguing for here in terms of asking for the Court to recognize New York state's Banking Law privilege. We're not, as Relator

suggests, seeking to protect Ocwen's day-to-day business records, the loan files, their analyses.

What we're really concerned with here is kind of core bank exam material, the communications between the Department, its Monitor and its regulated entity, the work papers that were submitted by -- the work papers prepared by the Monitor and the reports that Relators seek.

We've briefed Finch extensively as to -- ACLU v Finch as to whether under that test the Court should recognize New York state's privilege.

THE COURT: You concede that that's the analysis the Court has to do? I know that Ocwen makes the argument that under the Federal Rules of Evidence that tries to fit this into a state issue, but --

MR. DEAN: Your Honor, I --

THE COURT: Are you contesting really this is a Finch analysis, that Federal Rules of Evidence 501 does not -- it would be federal common law in this case. Would you concede that? I'm not sure Ocwen would, but would you concede that, that we have to do the Finch analysis?

MR. DEAN: I --

THE COURT: I mean, I'll tell you that's where I'm at, so unless you can convince me otherwise. But I don't see -- the way I look at it is of course it's a federal claims act or False Claims Act claim, which is a federal cause of

action. There's nothing in the complaint -- the cause of action in the complaint, they aren't independent state claims. They're federal causes of action.

Now, are there allegations of facts that are including various state issues? Yes. But that's where I look at. And I understand that you can have a mixed question, but there aren't any state claims and I'm not sure that there's any -- well, I'm giving you a heads-up of what I think, but I'll give you an opportunity if you want to rebut this later, but that's my view, that the state rule isn't going to decide the case in essence. So in the Court's view, I have to reach Finch, if I get to this point.

MR. DEAN: Your Honor --

THE COURT: So I made that long -- I gave you an advanced view of what I think and it sounds to me like you agree with me, at least in a general sense.

MR. DEAN: I do agree with Your Honor. I really don't want to take much of a position contrary to Ocwen's position or to Relator's on any matter. You know, I should say that the Department is a reluctant Intervenor here.

The concern that we had is when the argument starts to focus on there can't be any state law banking examination privilege in a federal question case, there's a lot of troubling implications there for us, and that's what our interest is.

So I don't want to say Ocwen is wrong, but I agree with Your Honor that we have to do the Finch analysis here. So I think we've briefed the Finch case extensively in the papers. I think for the purpose of the oral argument I would like to simplify the analysis.

Finch, as you pointed out, recognizes that there may be exceptions to the general rule under 501 that a federal privilege -- federal common law does cover privilege in a federal question case. Finch says basically, in my view, that a state law claim can be recognized if it's meritorious and if its recognition won't pose an undue burden on the general federal interests in there being full discovery and fact finding.

I think as to the first question, the meritorious nature of the privilege, I think it's very clear. There's 75 plus years of case law in federal courts recognizing the importance of some level of -- of privacy and facilitating candor in the communication between the regulator and its regulated entity.

I think the same kind of public policy considerations that underlie the federal recognition of a bank exam privilege apply with equal force to the New York state exam privilege, and indeed to the exam privilege of any other state.

I think the question here then is does the recognition

of New York state law impose more of a burden than the federal bank exam privilege would, and in that regard I will acknowledge there's a difference between New York state's bank examination privilege and the federal common law.

New York protects absolutely from subpoena all correspondence, memoranda, and reports relating to or arising out of the examination of a regulated institution. The federal privilege only protects kind of non-factual. It's very much like a deliberative process privilege. In fact, we cite some cases that identify it as a derivative of the deliberative process privilege.

Non-factual material is protected and it's a qualified privilege, meaning that it can be overcome or it can be ignored if there's a substantial need for the evidence.

I think in this case on the facts of this case, applying New York state's privilege does not unduly interfere with the federal interests in getting to the truth in this case.

As Finch recognized, there's a number of instances in which the federal interests may be reduced. One is where there's substantially the same information can be obtained from a non-privileged source, and as we've discussed at length here today, all of the records that Ocwen -- that the Monitor reviewed from Ocwen, the loan files, all the things that are the factual information contained in the

examination material is available to Plaintiffs, to Relators.

THE COURT: Of course, they haven't received them yet.

MR. DEAN: I -- I have no control over that.

THE COURT: I understand. I understand.

MR. DEAN: I think the Department had its own issues with Ocwen. So substantially the same --

THE COURT: Let me ask you this.

MR. DEAN: Sure.

THE COURT: The idea is you want to get to the truth, so what better way to get at the truth than to have in this case the Plaintiff and Relators have access to these reports which ultimately led to an agreement later, but showing your allegation of wrong-doing, which they're saying they never admitted to, which happens probably in any settlement. But you certainly thought there were violations, so what better way to get to the truth than having to cull through, you know, millions of documents trying to piece it together, whereas you've already done that?

MR. DEAN: We've done that to a different set of facts than are alleged in the complaint here. As I think both StoneTurn and BPA have stated, the analysis that was done by the Monitor is different than what's alleged in the complaint here.

There was -- the complaint generally alleges -- the claim is very similar. The claim is Ocwen falsely certified its compliance with state law, but the generally -- particularly as it applies to New York state law, what they allege is that Ocwen did not modify loans in a way that were affordable and sustainable.

The Monitor looked at different issues and different violations of New York laws. It looked at foreclosure. Did they check to see if they had the right to foreclose before they foreclosed on a property. They looked at conflicts of interest in that Ocwen has some related companies that do business with each other and whether that impacted their operations.

So there's a different scope of issues that were looked at by the Monitor than were looked at here, and that's part of the reason why I don't see a burden to the Relators for not getting this information. I don't see that this information supports the claims, the information that support the claims that they're alleging in this case.

And I know this is something of -- it's a subject I'm reluctant to get into, but I do question whether they can be an original source of the material that's alleged in the consent orders that were published by the Department.

So the material -- the Relators can get substantially the same material from other sources.

The other point is I don't know that -- I wouldn't say that this is a case that Finch doesn't apply, but Finch does recognize that a claim may be nominally federal where state law issues predominate or where state law issues are incorporated by reference.

And as the Monitor's work is relevant here, it's a review of New York state regulation. In fact, it's a regulation that was promulgated by the Department. So the substantive issue, the substantive violation is a question of New York law here. And it's not only a question of New York law but it's a question of how our regulated institutions should behave.

I think in that situation there's a clear kind of New York concern in the interpretation of the law and correspondingly the New York privilege should be applied.

I will say there are -- in fairness, there's three categories of analysis that the Monitor did do, as I understand, that are kind of arguably relatable to what the allegations are in the complaint, but it's a very small subset of the Monitor's work papers and reports.

Generally they looked at -- for example, they looked at a substantial part of the allegations in the complaint. And I apologize. I looked at the fourth amended complaint. I didn't realize that that wasn't the operative complaint here. But from what I've seen, the substantial allegations

in the complaint involve whether Ocwen offered affordable modifications.

I understand the Monitor looked at the model, kind of the electronic model that Ocwen used to prepare those kinds of modifications, but it didn't look to see whether it prepared -- whether it was designed to generate affordable modifications, whether the inputs were intended or played with to not get affordable modifications or whether it produced affordable modifications, more to look at whether the model performed as Ocwen expected it to.

So there are areas where there are arguably relatable material that the Monitors examined in the work papers and the core examination material, but by and large, it's a different issue than the Monitors were alleging here.

THE COURT: Thank you.

MR. DEAN: Thank you.

THE COURT: Did Ocwen want to add anything to that?

MR. WIMBERLY: Sure. Your Honor, I think first it's just in terms of the recognition of the privilege we're asking the Court to provide.

As to the state law privilege 36.10, the question of whether the Court ought to -- ought to employ a state law privilege in a federal question case is on the table. We think, because this is a False Claims Act case and specifically the way it's pled, that there are good reasons

to do so in the context of what's not completely clear under 501. How this happens -- what happens when you have -- you don't have a diversity case. I mean, everybody agrees 501 is a federal question. It will be federal privilege except where you have -- and it would be state privilege if it's a diversity case, and if you have a state claim in a federal case, 501 teaches that you are to employ state privilege law.

We're in a gap here and I don't know whether there's -- we haven't found any precedent that would -- that would tell the Court you can't employ the state law privilege where there is this kind of state law claim as it were.

The -- the False Claims Act and the petition and the complaint here is based on the predicate that my client violated state law, and in fact there are over 40 pages of state law allegations and they -- they live or die based on their ability to prove that we violated Massachusetts, New York and now -- and Texas. That we violated New York, that's what we're talking about today. They want to prove that and they want to get facts and then they're going to apply New York law, in fact a lot of it, no doubt, or they'll try anyway, governing servicing of loans in New York. So it's the whole bundle. It's a New York -- it's a New York theater completely.

Now, for us not to be able to use -- to employ a New

York privilege as part of the defense to deal with the evidence, it would seem not to be consistent with due process frankly, Your Honor.

And let me say, that moves to the Finch analysis, in my mind anyway. Judge Wisdom in Finch says -- or in effect I think this is the way the Courts have interpreted Finch, it's a balancing test and Your Honor is going to look at the interests on both sides of the issue, the interest in getting the truth out. Although I would question whether there's any truth to it, what the regulator thought about violations ends up completely irrelevant because there's no finding of violation. There's just a consent decree we talked about, but put that aside.

The -- the process of dealing with this kind of examination requires, for it to be effective, requires that there be frankness in the exchanges of communication, particularly in the context of discussing potential violations. So bank examiners -- as the Courts teach, bank examiners really can't effectively function -- examinations can't effectively function without a cloak of privilege protection, and that's the basis for the New York rule and that's the basis for the common law banking privilege.

No reason to question the application notes policy principles here. In fact, we're talking about four million pieces of paper exchanged and a lot of analysis that went

into it.

We would have been chilled -- and I'll tell you how that is evidenced. In the -- in the engagement letter that's under seal, Exhibit B that was discussed earlier, that's the agreement between Ocwen and the Monitors, and in it there is a specific provision that I invite the Court to look at with respect to confidentiality. And the parties agree that the -- that New York law, Banking Law 36.10, is applicable to communications in connection with the monitoring.

So my client, Ocwen, and the Monitors certainly went into the process -- into the process with the expectation that their communications would be privileged. And the regulator is -- under the law the regulator may have the power to waive that. The regulator is not waiving that, so the regulator is prepared to assert the coverage of the privilege.

So in terms of the Finch analysis, we think it would -- those factors balance in favor of application of the privilege and --

THE COURT: But let me ask, I mean, if I extend the privilege, I would be the first court to do so in this nature of a case. That privilege has never been extended in -- I think by any court.

MR. WIMBERLY: The --

THE COURT: I couldn't find anything either, so --

MR. WIMBERLY: I think it's a small step from, for example, the Garza versus Scott & White decision 234 FRD 617 we cite in our brief, extending, in other words, the steps out from diversity cases to appendant state claims, this is a small step.

THE COURT: But is it a small step? I mean, I think in every one of those cases there were some state claims, and so now we're looking at basically is the allegation an essential element of their cause of action, which is a federal claim.

MR. WIMBERLY: Your Honor, I -- I submit that the FCA makes this a very unique situation with respect to the interplay of state and federal claims, that you don't -- maybe there are other contexts but I can't think of one offhand where you literally package a state claim as the predicate, the sole predicate for a violation of the federal statute, the False Claims Act. That's the formula here.

If we're stripped of the privilege and the evidence comes in, I think we've been denied -- in the way that the Courts like Garza move the privilege or the state law privilege to appendant claims and beyond just the rigid it's gotta be diversity or you're under federal privilege. Otherwise, you are disregarding the state privilege that the parties have relied on and that's -- that's the rule of

decision, which is what the cases tell us. If state law is the rule of decision, then the state privilege ought to apply.

And, Your Honor, lastly I would say this isn't an out there kind of privilege. You know, lots of states have lots of different kinds of privileges and that's the basis for 501's formula, because obviously a federal court should not have to accept some crazy privilege in my state of Louisiana, for example. But this is not. This is a bank examination privilege recognized at the federal common law level.

So again, in terms of the small step, that -- the model of it is already there. This happens to be just the New York state version of the federal common law bank examination privilege. We would submit it would apply to whatever your decision is on the state law.

THE COURT: Thank you. Mr. Johnson, are you making this argument as well?

MR. JOHNSON: At the risk of talking you out of being predisposed in my favor, I think I am.

THE COURT: I didn't necessarily mean it like that, but go ahead.

MR. JOHNSON: Your Honor, we agree --

THE COURT: I think everyone is doing a very good job, so --

MR. JOHNSON: Oh, no, I'm -- I'm being facetious.

THE COURT: I meant only that coming in I -- you know, you form opinions about things coming in. But I always, going back to my appellate days, keep an open mind and look at things in different ways.

MR. JOHNSON: Certainly, Your Honor. I didn't mean to imply otherwise.

THE COURT: I'm not ruling against you yet. Now I'm -- now I don't know what I'm going to do, so you haven't lost, you haven't won. But go ahead.

MR. JOHNSON: Thank you, Your Honor.

The Court is correct and we agree with the New York Department of Financial Services, this is a Finch case, and it is a Finch case because at best, proof of a violation of New York law, Texas law, Massachusetts law is a step within the analysis that has to be done in a federal False Claims Act. It is not an essential element. It is not an element. We've got the elements of the FCA laid out there. So because of that, this is a Finch case.

So this is not a -- the fact that New York or New York's allegations are a part of this case does not mean that New York privilege law should govern any more than the fact that Texas -- violations of Texas law are also at issue and the Texas law would govern. In fact, that would lead us to a morass of problems with privileges going different

ways, and that's why federal law controls under 501.

In the Finch balancing test, as the Court knows from Magistrate Hine's opinion, that first question of is there --

THE COURT: To confess, I didn't know of Finch until this sole issue. I never had dealt with Finch before so I didn't know there was such analysis until I read all the briefing and got into this issue. But go ahead.

MR. JOHNSON: Does the fact that the courts in the state recognize the privilege itself create good reason? As Magistrate Hines said, that question is almost always answered no, and the reason is because the existence of the state privilege alone and the fact that a state will recognize it doesn't give rise to the overriding or doesn't override the federal concern in a federal question case.

I would say, Your Honor, you're in a very limited, narrow circumstance of an FCA case. We're not talking about -- and the New York -- I don't think the Department of Financial Services argues this, but we're not asking you in this decision to rule that the New York state banking privilege can never apply in private litigation in federal court.

We are in the unique circumstance of a False Claims Act case, which is unique because the real party in interest is the United States of America. The United States of America

controls the resolution of the case and is ultimately the beneficiary of the case.

So there is an overriding and unique federal policy that is present in this case, that comes to bear in this particular decision that is not present in other cases. And, frankly, Your Honor, we think that's why this privilege has never been recognized in the FCA context.

If we talk about --

THE COURT: Let me make sure. Not only has it been not recognized in that context, we don't have a case where -- I don't have an opinion that I could find in an FCA context that -- that it was rejected either.

MR. JOHNSON: Correct.

THE COURT: I mean, we don't have any cases.

MR. JOHNSON: You're correct. You would be the first.

The second part of the Finch analysis -- and I disagree with my counsel, my fellow counsel from Louisiana, that Finch is not a balancing test, because Finch -- in question two all of the factors in Finch must be answered in favor of the privilege. If any one of them is not answered in favor of the privilege, doesn't weigh in favor of the privilege, then the privilege isn't recognized.

Here we believe that really none of these substantially weigh in favor. In fact, most of them go against the

recognition of the privilege.

The briefing has that, and I won't go through all the details because the briefing has that, but I will note the Fairchild decision is informative. And I think this is really applicable to what happened here is that I believe the parties do have an expectation that everything is not going to necessarily be publicly aired, but not that it will always be shielded from discovery. Certainly governmental entities share information all the time, and in particular in this case, which I think makes New York a little unique, is the statute specifically allows the Superintendent to waive any or all parts of his investigation at his discretion, if the public needs to know or if justice requires it.

And that happened in this case. Four of the correspondence, four of the letters that the Department of Financial Services sent to Ocwen were published to the public. The consent order itself was published. These weren't kept confidential. And in fact, the CEO testified that this whole matter -- they were having discussions with Fannie and Freddie Mac because this whole matter had become so public. And I'm happy to provide that testimony to you. I think it was taken after the briefing.

So in this case in particular, the idea that confidentiality is necessary, I agree confidentiality is

necessary, but that doesn't necessarily mean it shields things from complete view when the United States Government wants to come see if it has been defrauded. I think particularly in this case where there has been, we would argue, a complete waiver as to subject matter by the Superintendent of the New York Department of Financial Services publishing his letters. Ocwen also published a letter to its clients about some of the backdating issues that formed a part of this case.

There has been a substantial amount of publicity around this, and it seems that the only person who can't know the details of that is the Relator who is seeking to find out the truth about whether the United States has been defrauded.

And that truth, Your Honor -- I would say I would disagree with counsel for New York a little bit, is that the crux of the claim in this case is that there were false certifications made to the Federal Government that Ocwen was in compliance with all state and all federal laws. So to the extent there are other violations, they are encompassed within that certification, whether that was Texas law or New York law. So the claim is broader than that.

I will also say that the truth is at the end of the day the New York allegations did result in a substantial fine, the CEO resigning, and so this wasn't some small,

insignificant matter. This was a major ordeal that the Superintendent, in his discretion, decided the public needed to know about. So we believe that the United States' interest in a False Claims Act is equally as strong in terms of its ability to know.

I don't know -- I was unclear, Your Honor. You discussed a little bit about the federal common law privilege, whether you actually wanted to have argument on that. It sort of got mish-mashed in some of this. I'm happy to forego it. I think it is a qualified privilege and is subject to be overridden, and I think in this instance can and should be.

I think the candor requirement, the need for confidentiality has really been exploded in this case because of the public nature of the investigation.

THE COURT: Thank you. I don't necessarily need that addressed unless the parties want to. I know Ocwen raised that issue, but for purposes of the Department, if you would like to respond.

MR. DEAN: Yes, Your Honor.

I want to apologize. I think I sat down prematurely before. I guess this is what happens when you get up at two in the morning to fly down to an argument.

THE COURT: You're doing fine.

MR. DEAN: The -- I did want to say that we do think

that there is ample reason to apply the New York privilege here, but should for any reason Your Honor decide not to, I see no reason that the federal privilege shouldn't apply.

Unfortunately, the process would have to involve a review of the documents, logging, redacting, production that would have to be done here.

I want to say a couple things in response. As to the idea that there is no expectation of privacy here, one, I think Fairchild -- the reliance on Fairchild is misplaced. I think they're relying on a line of dicta there. The key factor in Fairchild appears to be that the person who's seeking the discovery was actually at the meeting. They were there, they heard exactly what was going on. So to say that they weren't entitled to the transcript of the meeting, to the recording of the meeting, was somewhat silly in that situation.

Two, and this kind of goes back to why I tried to simplify this argument, the Federal Government, the OCC, the fed, all have the same ability to waive the bank examination privilege. Nobody says that there's any less of an interest in maintaining that privilege or that the privilege is invalid because of that possibility.

Moreover, in terms of the expectation, there is an engagement letter. There's language in the engagement letter that says that we expect -- and this is language the

Department asks the Monitor to put into the engagement letter with the regulated entity -- stating that we expect that they're going to be accessing banking examination material, material protected by Banking Law 36.10 and that they won't disclose it.

Then I just want to briefly address the subject matter waiver argument. There isn't, from what I can find, a lot of case law on the question of subject matter of a waiver of a bank examination privilege. The closest that I can find is deliberative process, and the split is -- I think what Relators are arguing is an attorney-client privilege waiver. That is generally where you see waiver of a subject matter.

There's a whole world of cases that say on the executive privilege cite, deliberative process, executive privilege, there is no subject matter waiver. Whatever is publicized is waived. Whatever isn't is not waived. I think that's -- that's the better rule to follow here. It's more applicable to what's alleged in this case and what's involved in this case.

One other thing. You know, in terms of the publication, there are competing interests that the Department serves. Generally examination material is held absolutely confidential. There is -- when you do have issues of wrong-doing, there is some interest in disclosure, but not full disclosure. And this is no -- again, no

different than the federal regulators. The OCC, for example, you can go onto their Website. There's an enforcement action page and you can look at their enforcement orders, and it depends on the order. Some of them are more descriptive than the others, but again, there's -- when there is an issue of wrong-doing, there is a government interest in providing some disclosure of what the nature of that wrong-doing is. It provides a warning to other regulated entities and it provides some notice to the consumer.

But the interest here and the concern particularly as it relates to the Monitor is this detailed analysis that they do, kind of the review that -- the conclusions that they reach. If that's available, you know, we're concerned that no one is going to want to cooperate with the Monitor in the future.

Thank you.

THE COURT: Thank you. Are you sufficient with the argument he made?

MR. WIMBERLY: Yes, Your Honor, just a very few comments. The -- and especially with respect to the notion of a subject matter waiver. It is true the letters were publicized and the consent decree, but nothing else. And importantly, the Regulator has not waived the privilege with respect to the underlying information that we're arguing about

today.

Also, Your Honor, we're not arguing about business records as we have established, but the -- the rest of the subject matter subject to the privilege has not been waived.

The second point, there's an empty chair over there, Your Honor. The Government is not here and it's a non-intervention case. Not only is it a non-intervention case, the Government has not issued any -- made any statements to the Court, and typically they will if they have an interest in the issue. So there's a complete silence as to the Government. I think you can -- it's probative what their interest is. We don't know.

THE COURT: Well, that's true, but of course, if the Relators win, the Government takes a share. The case can't be dismissed by agreement of the parties without the Government agreeing to it as well. So I understand they didn't intervene but ultimately they're representing the Government in a sense.

MR. WIMBERLY: They have an interest. They're not a party and they haven't intervened, and they investigated it for several years and made their decision, and I submit that to the Court, that there is a silence there. So we are looking at just what the Relators want.

The problem for us as a putative Defendant in this kind of case, Your Honor, and it's typical of False Claims Act cases, typically they get thrown out, and we hope Your Honor

throws this one out too. But they come in and they're bounty hunter things. And they come in and that's fine. I understand the public policy and it's the Lincoln Law and all that. We respect all that.

But, look, these guys don't have any evidence. They're going to get their evidence from us. We just took the deposition of the Relators and they admitted under oath, they don't have any independent evidence. It's all from us. And they're desperate to get at all these records to find something.

What the Fourth Circuit would say is they're out here because they didn't come with a claim in hand. The Fifth Circuit is somewhere around there too.

And the frustrating thing, Your Honor, is the burden on a Defendant in our situation, especially in this age of e-mail and with respect to discovery where it is a hugely expensive problem before we can even see what it is somebody thinks we did wrong.

THE COURT: I'm not sure how that relates to the argument we're --

MR. WIMBERLY: Your Honor, I just wanted to make that point.

THE COURT: Thank you for that general statement.

MR. JOHNSON: Your Honor, I did want to just remind Your Honor that the sealing hearing in this matter, the

Government did request a continued seal be maintained on the amended complaint and wanted to continue to investigate. And I believe the Government continues to have a right to intervene and is monitoring the case. So it is not -- the Government is not a disinterested bystander at this point by any stretch. Thank you.

THE COURT: Okay.

MR. JOHNSON: I'll -- I won't respond to the other stuff about the evidence. I have a response but I know we're pressed for time.

THE COURT: Thank you. So I think that concludes those arguments. Now, Ocwen had a motion to quash. Do you want to argue any of those other kind of alternative issues you raised or do you want to just rest on the briefing on that?

MR. WIMBERLY: Your Honor, I recognize it's getting late. We would submit that our position on the settlement privilege is not collateral or secondary. In fact, it's its own --

THE COURT: No, I understand. I mean, I'll let you argue that. It seems to me you're conflating that significantly to apply to the situation that I'm not sure applies, but --

MR. WIMBERLY: It may not apply specifically to the contract -- the compliance monitor records, Your Honor. We would submit to the Court that that issue can wait for another

day and really should be teed up with the privilege log, and we would be -- we'll provide that.

Under Goodyear and then there's several Eastern District of Texas cases, it is recognized -- it's 408 as a privilege. It's recognized in this jurisdiction and then I think you just deal with does it apply or not with respect to the particular documents. And we've been basically talking about something else. So to that extent, we can defer that issue to another -- to a later date with the Court.

THE COURT: So in terms of the motions that I actually set for today, I think -- is there anything else that I have omitted that we need to address related to these discovery -- really, the non-party motions?

MR. JOHNSON: Not from the Plaintiffs, Your Honor, or Relators, Your Honor.

MR. WIMBERLY: Not from Ocwen, Your Honor.

THE COURT: And then have I taken care of everything you wanted to say from the non-parties and also the Intervenor?

MR. SIEBMAN: I think that's all, Your Honor.

MR. BURD: That is all, Your Honor. Thank you.

THE COURT: Very good.

MR. DEAN: Thank you, Your Honor.

THE COURT: Okay. So of course the non-parties, the Intervenor, you're welcome to leave. There are still some

issues and I need to have a status conference on the other issues. Of course, you're welcome to stay or not. It's totally up to you.

My court reporter, I have to think of her and give her a little bit of a break here. I do have a contempt matter in a civil matter that's set for 3:30. I don't know if they're even here yet. What I'm going to do is take a short break and we'll come back. If that matter -- they may have resolved it. I don't know what the status of it is. If I have to proceed with that hearing, if it's going to be quick, I may just take that up first before coming back into this matter.

MR. JOHNSON: Your Honor, I have hard copies of our slides I was going to give the Court.

THE COURT: Yes, that would be nice. Did you provide a copy to the other side as well?

MR. JOHNSON: Sure will. If I can approach.

THE COURT: Okay. We'll take a ten minute break and come back.

(Recess.

THE COURT: Please be seated. We'll go ahead and continue with y'all just because my other matter, I think they have resolved some of it but it's not -- it may take more than just a few minutes, so we'll continue on.

This is more of a status conference. This is to see

what else -- where we are. First, let me confess -- I know Ocwen raised the issue of hoping I would dismiss the case and resolve those issues in the case, and I know those motions have been pending for awhile. I have to confess that last week I finished my seventh jury trial since becoming a District Judge. As a Magistrate Judge I only had one law clerk. I didn't get that second law clerk until January and then I'm still without a Magistrate Judge so I'm still doing double duty on things. That should be resolved and hopefully I'll have a Magistrate Judge here before the end of the month.

But with that confluence of events and being in trial so much, I just haven't resolved that. And, of course, I just happen to have three qui tam cases on my docket that all have similar motions pending.

So I can't give you an estimate. I wish I could, but we hope -- my hope is to get those done hopefully in the next 30 days, so that's kind of where we're at on that. That's why I have not done anything on the amended complaint or request for leave to resolve those issues. I didn't want to cause an issue of mooting anything out unless it's resolved and then I'll look at it and see if the amended complaint should be done or not. So that's where that's at.

What else can I help you all with since we're here? Clearly it sounds like there's some discovery issues, maybe

more than we should take up today. Of course, Mr. Wimberly has said that they're thick in the process of getting it done and getting things started. I know that in the response the Relators indicated that a motion to compel was forthcoming.

I don't know exactly the issue. My chambers was called, which is a requirement that I have. I like in any case for me to be called first to see if I can resolve it informally. I was too busy to take it up, so I guess the Relators couldn't -- I don't think you've filed anything, I don't believe, so --

MR. JOHNSON: We have not, Your Honor. We actually called last Thursday to see when Your Honor would be available on Friday for a potential call and that's when we got the message that you said the schedule would not allow for it and we should file our motion.

THE COURT: I was in Tyler at the federal court there, so, yes, I wasn't here Friday.

MR. JOHNSON: So that is underway. We are continuing to work with Ocwen's counsel to try to get documents and then to thereafter take depositions. I think there will likely be motions on both because we are so near all of the deadlines. And quite literally, Your Honor, this is probably, given the scope, a million plus document case, and this isn't the first time these kinds of allegations have been a part of Ocwen's

life. Certainly very experienced counsel.

THE COURT: Well, and I understand. Mr. Wimberly --

MR. WIMBERLY: Don't worry about it. I don't take --

MR. JOHNSON: My point is, Your Honor, they know how to do this. Their counsel regularly -- you know, this is his business is white collar defense and corporate investigations. They know how to do this, and by all means, counsel has been the utmost professional, courteous, and we're trying to work with them and we've tried to stay out of this Court's hair, knowing how busy your docket is, but at some point we've got to get documents. We've got to be able to analyze those. We've got to be able to actually take depositions and work with experts.

Right now our sense is that it is not counsel's fault but that their client needs a fire under them to get things going, because four months and we've got 700 documents. At this rate, the Supreme Court will be denying the cert on the case before we get the last of the documents in a case of this scope.

THE COURT: Okay. Mr. Wimberly.

MR. WIMBERLY: Your Honor, we filed yesterday a short memo to respond to the several contentions here, but one correction. It's not 700. It's 15,000, I believe, 10 to 15,000.

MR. BOYD: Pages.

MR. JOHNSON: There's 700 documents.

MR. WIMBERLY: Well, we can quarrel with metrics, but in fact, we've been producing. We've had six, seven rounds of production. We have a rolling production.

THE COURT: The difference is I think they're saying 700 documents versus how many pages, but --

MR. WIMBERLY: Oh, well --

THE COURT: That's what he's saying is 700 documents.

MR. WIMBERLY: But we are looking at a mound of discovery requests, and that's -- that's identified for Your Honor, in the scope of -- well, it's been five months.

I'm going to give you an example, Your Honor, of what we're dealing with as to the 30(b)(6)s. We had one -- the first 30(b)(6) deposition notice comes in and it's for ESI, so we find a representative who can speak to the ESI issues and then we're talking to Relator's counsel and had a telephone conference and I think mooted out the need for a formal. But we have been ready for a formal 30(b)(6) on ESI for over a month, but we're trying to work it out. That's the spirit of the rules. As to ESI.

Then in March I got not one, not two, but five -- is it four or five?

MR. JOHNSON: I believe it was five.

MR. WIMBERLY: Five new Rule 30(b)(6) notices, and I'm thinking why five, how do they relate to the -- you look at

them and they ask for a corporate -- they ask for party depositions on April 29 but only if there's been substantial document production, so there is no date certain for these things. Who knows? Then the list of topics, consistent with the number of interrogatories we've gotten, we got over a hundred requests for admissions. There's 70 plus topics. Now, how -- we'll have to have 30 30(b)(6) representatives. It's unwieldy.

So I spoke with Mr. Boyd and we had this conversation followed up with e-mails and letters. Look, this is a nonstarter. We're ready to give you a 30(b)(6) representative or however many we need. Give me a manageable list of topics and let's talk about a time, a date certain, not when you decide that we've had substantial document production or I've decided it. So let's talk about timing. We are going to do that.

But the discovery request is just a pile-on. It's just a mess.

THE COURT: So you've already answered all your requests for admissions, interrogatories --

MR. WIMBERLY: All and we've answered them on time. Your Honor, we've submitted answers and objections. And let's get to what we're dealing with, Your Honor.

The discovery process throughout this we have built to correspond to their requests that we have not objected to

and we've told them how we're going to respond, policies and procedures. They wanted all the e-mails of our CEO -- I mean our chairman, Mr. Erbey, before his deposition. We diverted our resources to go through his tens of thousands of e-mails, produced that before the deposition.

Now they prioritized Mr. Bullock's e-mails. There are 90, right? 90,000 e-mails in the population. To the question, can we limit this according to subject matter, no, we want all of his e-mails. Well, that's got to be processed. We have a vendor, we've downloaded and we are in the middle of reviewing those, and sooner rather than later they're going to get a deluge of e-mails.

But that's not all of it. In 2015, as opposed to 1992, the magnitude of this stuff is driven by a direct proportion to number of custodians, Your Honor, and we have a five year period of time. They won't limit the list of custodians they want us to search for their categories of evidence, which means we've got -- how many custodians? 40? 40. We have loaded up. That's a million plus documents.

Now, this is what's going on. They think and they have demanded that they just be allowed to take a look at all that, that they can go in and do a search because we have a clawback agreement. Well, that doesn't suspend our right to -- we can't just not look for privilege, period, as a result. That's an inadvertent disclosure.

But we have a process to screen for privilege. We've got a process to screen for irrelevant material that might be highly provocative in the marketplace. It's a publicly traded company.

And let me stop there. They don't trust us. We don't trust them. The Relator has -- he's on record as having admitted having stolen records from prior law firm employment for this case. This is what he does. Now, that's not a merits issue, but that does give us a little pause before we would just give them all of our e-mails. So we have a screen.

THE COURT: So we'll -- we'll accept as a fact you both distrust each other on certain obligations, so where -- the bottom line is where are we and how can I assist? At this point is there anything I can do and I'll try to work it out?

MR. WIMBERLY: Yes, Your Honor. If I may, just in terms of assisting, and I don't think they're going to disagree, if we could have a plan that would limit custodians, if we could have a plan that would restrict -- I think they really want loan files and I think they really want certain e-mail files. They've already told us Mr. Bullock. We're going to get them that. Mr. Erbey, we got them those. And Mr. Farris, our CEO, we're uploading and searching those. So there are targeted searches that are still voluminous, but that's not this whole universe.

If the Court could facilitate a discovery plan that would make some of those limitations, we'll get done a lot sooner.

MR. JOHNSON: Your Honor, our problem is we're sitting here with no visibility into their company. We don't know who the person was responsible for, you know, enforcement of this policy, that policy, so we're having to stay at a very high level. If they will begin to give us documents, more than 700 over the course of four months, then that's what -- I hear how hard they're working but you can't look at this as we're going to do one person, then we're going to do one person. This case is too broad for that.

I mean, we need to have the people that were responsible for the foreclosures. We need those people. We need specific, germane areas of the company. Are they custodians we need? We don't know who they are. They do, and they need to identify them and they need to tell us who does what and then we maybe can select. But right now we're blind.

THE COURT: So how do you perceive that the Court can assist?

MR. JOHNSON: My perception is the Court can assist by giving us dates certain by which to complete document production, by asking -- by ordering them to give us by category who the custodians are in certain areas of

responsibility relative to the case and they can -- I don't know how to segregate those categories because I don't know what their departments are, but starting at the CEO and CFO. I mean, they aren't the people that are on the ground. I understand there were reasons to do that. I'm not being critical about it. But it's the lower and mid level people that actually have the information that we're needing. And most of all, we need loan files. We're going to need that.

And so a good production would have been everything they gave New York as a starting point, because then at least we can start to see the policies and how things break down and who has supervisory -- maybe that would be helpful, if you would order them to produce everything they gave to New York.

MR. WIMBERLY: On the loan files -- and he's right, that's the core of their stuff -- we have agreed to a process. So in a way what you're saying is a little bit behind what -- where Chad Walker is with my team. We are sending them 14 sample files from Texas jurisdiction side of the complaint. That's the starting point. Beyond that they will tell us what they --

Loan files, they're tough to put together, but we're in the process where they at least will identify what they want. Consistent with my suggestion to the Court as to how the Court might help, with loan files I think we're okay. I

think we have a process. They'll talk to us about what they want beyond the 14 sample. So that's not the problem.

In terms of custodians, they have work charts. They've got interrogatories they can ask. I don't know if they want us to interpret their points with respect to our custodians over time. We can't do that.

THE COURT: Of course, you understand the Eastern District, the way we view document production, disclosure is a wide berth. So, I mean, some judges don't even require a request for production. It's simply a matter of saying you produce everything that goes to any claim or defense.

MR. WIMBERLY: Right.

MR. JOHNSON: And I think that would be helpful in this case, Your Honor.

MR. WIMBERLY: Your Honor, I suggested limiting custodians to limit the time. We are actually proceeding on the basis of the large population of custodians. We have in fact jumped ahead of the Court on that. Not ahead of the Court, but we are consistent with where the Court is. We recognize our obligation.

We have now 60 people or so and we're uploading their e-mails. That's five years of e-mails. You think of the normal employee, if Bullock is an example, that may be 90,000 e-mails. Let's say it's 60,000. There are going to be 60 sets of 60,000 e-mails in this database.

We have a search protocol that we worked out with them. We have search terms. We're ready to pull and review, but that's a time problem. That's not a substance problem. That's what we're doing right now.

But these wheels, they're going but it will take a long time. With that universe of searchable material, our vendor has made it searchable and now we're putting our search terms to pull out the relevant material and we're going to screen and produce. But it's a time problem.

MR. JOHNSON: I think, Your Honor, obviously e-mail has its own unique problem but there's also the issue of just the corporate documents, policy manuals. I believe we have some org charts and the procedure manuals, check lists, the training materials that these employees would have received. Those are things that we ought to be able to get and that I know within the 700 we may have some sampling of some of those documents, but I don't believe we have all of them.

MR. WIMBERLY: Well, you went after all of them. That's the big chunk of the first roll of the production. Maybe we need to meet and confer on that. I'm surprised. We have pulled out as many policies and procedures as we can. We're still looking for them.

THE COURT: The only statement I would have is it doesn't seem like in a four month period of time, if they have only received 700 documents in this kind of case, that seems

odd to the Court.

MR. WIMBERLY: We have chunks in the queue.

THE COURT: Right. But my question is when are they going to get these chunks?

MR. WIMBERLY: The picture will look very different two weeks from now, Your Honor. I can't though commit to the Court in -- to be candid -- well, I'll be candid anyway. Don't worry about that, Your Honor.

THE COURT: I assume you would be.

MR. WIMBERLY: I don't know what's beyond that, but I do know they're going to start getting chunks of information that we are -- we are at a very positive point.

THE COURT: And what about -- Mr. Johnson raises the issue of -- the issue that took the first hour or so or more of our hearing on going after the non-parties and getting the documents, the documents that of course they don't want to produce -- spend the time to produce because they say they can get them from you or your client. So where are you on just producing all the documents you produced to them?

MR. WIMBERLY: We have now got -- we've got electronic access to the Share Point that was alluded to.

THE COURT: That should be a separate production of --

MR. WIMBERLY: Yes.

THE COURT: -- different from what was provided --

MR. WIMBERLY: It is.

THE COURT: -- to the Department.

MR. WIMBERLY: You are of course absolutely right. It is.

THE COURT: So where are we at on that?

MR. WIMBERLY: We have now -- we've got the database, we've got the documents, and we're confirming that these are the materials actually provided and making sure that we understand the percentage of all the materials that represent. But it ought to be almost all, and theoretically, we should be able next to download.

We still need to review but it's going to be a lot quicker process because of the nature of the history of those things.

But they are segregated. We have them electronically available and I've got a separate team bird-dogging that.

MR. BOYD: May it please the Court, Sam Boyd.

THE COURT: Mr. Boyd, you haven't spoken at all.

MR. BOYD: Yes. The Court has hit on really the key sensitive point, and that is I've been in cases with Lockheed Martin over building all kinds of military devices and boats, eight million, ten million documents, and it did take them three months to comb their entire files. We got everything in three months.

We haven't gotten a smattering of e-mail. I mean,

somebody could have just gone to somebody's monitor and to their CPU and run off some e-mails for us.

We haven't gotten any loans. And I can tell the Court why that's so critical, because the way they do their loan processes, we understand through our Relator, is unlawful in many regards.

All we need -- and I suggested to counsel, I said look -- he said, oh, we've got half a million loan modifications. I said no, look, let's do it the easy way. The low hanging fruit is the Boston Portfolio, because we have a witness, potential co-relator that we will join who has already given disclosure to the Government. He said, look, we reviewed -- my committee reviewed about 7500 loans, a committee of 19. 7500? That's nothing in this day and age. It really is nothing. If we had a thousand of those, if we had -- those are the ones, as Brett said, led to --

THE COURT: Mr. Johnson.

MR. BOYD: -- the stipulations. Mr. Johnson. Excuse me, you're correct.

If we had those, now we're getting into the fertile fields. And of course they have the documents. Our people were not authorized to take the documents out of Ocwen.

So if the Court said look, your Boston Portfolio, if you have 7500 loans, turn them over, that would at least get us started. But truly, we can't do anything. We're just

spinning.

THE COURT: Well, I understand. Thank you. I think Mr. Wimberly understands the Court's view of the discovery in our district and what should and shouldn't be happening, and I'll accept at this point that you're going through that process, but that process needs to speed up a little bit, okay?

Mr. Johnson, he says life will look a lot different in two weeks. If it's not, let's talk again.

MR. JOHNSON: That -- I was actually going to suggest that maybe we get this production, we see if things speed up in accordance with your wishes, and maybe have another status conference even by telephone maybe in 30 days.

THE COURT: Yeah, and I'm available to do it by telephone. Of course, today's hearing would be too long. My only issue about doing it by telephone is I can't have too many speakers. The court reporter will have difficulty trying to discern that, especially when people use cell phones these days.

MR. WIMBERLY: Your Honor, if the Court please, so that I haven't put everybody out on a limb in terms of the production effort, I'm confident there will be substantial progress in two weeks. What that means --

THE COURT: I understand.

MR. WIMBERLY: And I'll present to the Court whatever it is and we can deal with it, but I don't want the Court to

misunderstand.

THE COURT: Oh, I understand and I'm not holding you to that, but I'm instructing you --

MR. WIMBERLY: We --

THE COURT: -- life should look a lot different in two weeks. It needs to pick up the pace.

MR. WIMBERLY: Well, we'll --

THE COURT: If not -- y'all confer and if it hasn't picked up the pace, then come back to me and I'll make sure it picks up.

MR. WIMBERLY: We'll do our best, Your Honor.

THE COURT: Okay. What else? Anything from Ocwen, just miscellaneous issues?

MR. WIMBERLY: No, Your Honor. That -- that was it on ours.

THE COURT: Anything from the Relators?

MR. BOYD: One other thing, Your Honor.

THE COURT: Yes, Mr. Boyd.

MR. BOYD: I took the deposition of Mr. Erbey, the former executive chairman of Ocwen, and counsel inserted his privilege objections to a number of things like what facts do you know that support that position and so on. It became an impossibility. So all I want to say is I hope the Court appreciates our difficulty, not just with documents, but somehow we have to get past this privilege thing. And I'm

worried about your suspense dates.

THE COURT: I'm sorry, I didn't hear the last.

MR. BOYD: Your suspense dates in your Scheduling Order, because until -- I can't get much substantive deposition testimony as long as we have these instructions not to answer questions.

MR. WIMBERLY: Your Honor, let me --

THE COURT: Well --

MR. WIMBERLY: I do want to address that, because that's not fair.

MR. BOYD: What?

MR. WIMBERLY: The instructions not to answer. Erbey's were specifically, and you knew they were coming, with respect to what we argued today and that was to preserve the record, and we did. We asked you specifically can we postpone this pending getting some rulings on the privileges and you wanted to go forward with your deposition. And as you will agree, I facilitated having the deposition.

We fought the good fight and we put him up for the deposition and it went down. But it was before the decisions on -- and so I don't -- I know, Mr. Boyd, you don't --

THE COURT: Okay. Let me --

MR. WIMBERLY: -- intend to do this, and we did instruct him not to answer on --

THE COURT: Mr. Wimberly.

MR. JOHNSON: Your Honor, this is --

THE COURT: Okay. First, let me just tell -- let me say, of course, privilege is an objection allowed to be made in the Eastern District in depositions, if it truly is a privilege issue.

If you perceive that it's not a privilege issue, then bring that to the Court and I can address that. And we can do that informally in the sense of it doesn't have to be a motion to compel. If you can't -- after a good faith attempt to work it out, if you can't, then submit it to the Court and we'll have a telephone conference to try to resolve that.

If it truly is a privilege issue or if it depends on decisions the Court has to make on these other issues, if that impacts it, I'm not sure exactly. But based on the reference that you made, then certainly after the Court's decision on the discovery issues, if that changes that result, then we'll address it at that point.

MR. JOHNSON: I was going to say, I suspect that the Court's decisions on the issues of the day will give guidance as to how that issue ought to be resolved regarding Mr. Erbey.

MR. WIMBERLY: Thank you, Your Honor.

THE COURT: Okay. Anything else from Relators?

MR. JOHNSON: No, Your Honor.

THE COURT: Okay. Very good. Thank you very much for a spirited debate.

MR. JOHNSON: Thank you, Your Honor, for so much time.

MR. WIMBERLY: Thank you, Your Honor.

MR. DANNER: Thank you, Judge.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Jan Mason Date